91-1455

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

WILLIAM D. ALLEN, D.D.S.,

Petitioner,

v.

LOUISIANA STATE BOARD OF DENTISTRY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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5 March 1992

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QUESTION PRESENTED

Five years ago in this § 1983 civil rights suit the district court abstained from hearing plaintiff's constitutional claims against the Louisiana State Board of Dentistry, its members, and its prosecutor, defendant Guy Wootan, pending the outcome of administrative proceedings and judicial review in the state system. Threafter, the Louisiana Supreme Court sustained plaintiff's constitutional due process claim. *Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908 (La. 1989). Plaintiff then moved to reopen this § 1983 federal suit, to lift the stay previously issued, and he simultaneously filed motions for partial summary judgment as to liability on his due process claim and for an interim award of attorney's fees under 42 U.S.C. § 1988.

The question presented is whether, given plaintiff's success in the state system, the federal district court's refusal to reopen plaintiff's § 1983 action is inconsistent with the obligation of federal courts to exercise jurisdiction given them under 42 U.S.C. §§ 1983 and 1988 to protect constitutional rights, is outside the narrow "exceptional circumstances" limits of *Colorado River* abstention, and is thus an abuse of discretion.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, other parties are: Dr. J. Roy Chustz, Dr. N. Francis Laborde, Guy Wootan, Esq., Kenneth M. Boudreaux, R.D.H., Dr. Lionel L. De La Houssaye, Dr. Russell R. Dimarco, Dr. Merrick A. Dugal, Jr., Dr. Bennett P. Fontenot, Dr. Ralph B. King, Jr., Dr. Joseph M. Kochansky, Dr. Herman O. Blackwood, III, Dr. David E. Simmons, and Dr. James P. Tomaszewski, each individually and in their official capacities.

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To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 948 F.2d 946 (5th Cir. 1991), and appears herein at 1-A to 10-A. The District Court's Ruling on Motion is unpublished and appears herein at 11-A to 12-A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1991. Jurisdiction lies here under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

As amended, 42 U.S.C. § 1988 provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title, . . . the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

This is a federal civil rights suit brought pursuant to 42 U.S.C. §§ 1983 and 1988 seeking permanent injunctive relief, declaratory relief, money damages, and attorney's fees for violation of plaintiff Dr. William D. Allen's constitutional rights by defendant Louisiana State Board of Dentistry, its members, and its investigator/prosecutor defendant Guy Wootan.

(a) Course of Proceedings and Disposition in Court below:

Five years ago, on February 26, 1987, the trial court entered an order abstaining from hearing plaintiff's federal civil rights suit "until state court proceedings are no longer pending."[1] The Fifth Circuit, applying *Colorado*

[1] At the outset of the Board's administrative proceedings, Allen expressly reserved his federal constitutional claims for litigation in his § 1983 suit in federal court, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411,

(Continued on following page)

River abstention, affirmed. *Allen v. Louisiana State Board of Dentistry*, 835 F.2d 100 (5th Cir. 1988). Thereafter, on Law Day 1989, the Louisiana Supreme Court reversed the decision of the Louisiana State Board of Dentistry [hereafter Board] suspending plaintiff's license to practice dentistry for violation of plaintiff's constitutional right to due process of law. *Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908 (La. 1989). The Louisiana Supreme Court sustained plaintiff's Fourteenth Amendment claim that the commingling by the State Board of Dentistry and its prosecutor Guy Wootan of adjudicative and prosecutorial functions violated plaintiff's constitutional right to due process of law: "Wootan's involvement in drafting the opinion of the committee renders the decision infirm on both statutory and *due process* grounds." 543 So.2d at 914 (emphasis added). This is precisely the same due process claim raised in Paragraph 18 of Plaintiff's Second Supplemental and Amended federal Complaint, *viz.*:

"18.

> "The Board's lawyer and prosecutor, Mr. Guy Wootan, drafted the final decision of March 26, 1986, revoking plaintiff's license. This mixing of prosecutorial and adjudicative functions denied plaintiff due process of law."

By way of relief, the Louisiana Supreme Court on rehearing (June 29, 1989) ordered that: "The case is

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(Continued from previous page)

415 (1964). A complete transcript of the February 21-24, 1986, administrative hearing was filed in the district court in opposition to defendants' motion to dismiss, to stay proceedings, and for summary judgment.

remanded to the Board for a new hearing on the existing factual record before a committee composed of dentists who have had no involvement in the present case." 543 So.2d at 917. *Certiorari* was not sought by the Board.

To date, March 5th, 1992, no new administrative hearing has been held, pending resolution of Allen's further claim that the Board's effort to rehear charges dismissed on earlier judicial review for insufficient evidence, see 543 So.2d at 910, violates due process of law. *Allen v. Louisiana State Board of Dentistry*, No. 91-CA-1258, Louisiana Fourth Circuit Court of Appeal (briefing complete; oral argument continued on motion of the Board, February 4, 1992) (per Schott, C.J.). See also *Allen v. Louisiana State Board of Dentistry*, 565 So.2d 464 (La. 1990) (Board's application for stay denied).

(b) Plaintiff's Motion to Reopen and Lift Stay:

On July 12, 1990, plaintiff Allen filed a Motion to Reopen and Lift Stay "so as to allow plaintiff to file a motion for partial summary judgment and for an interim award of attorney's fees on his due process claim sustained by the Louisiana Supreme Court." 15-A, *infra*. In his Memorandum in Support of Reopening and Lifting of Stay, plaintiff cited the leading case of *Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1008, 1023 (3d Cir. 1981), and authorities in six other federal circuits, *Forest Hills Utility Co. v. City of Heath, Ohio*, 539 F.2d 592, 596 (6th Cir. 1976); *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982); *Pollock v. Baxter Manor Nursing Home*, 716 F.2d 545 (8th Cir. 1983); *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985); *Crane v. Fauver*, 762 F.2d 325 (3d Cir. 1985). *Exeter-West Greenwich*

Regional Sch. v. Pontarelli, 788 F.2d 47 (1st Cir. 1986), all of which support plaintiff's application to reopen this matter, lift the stay, and allow the filing of motions for partial summary judgment on res judicata grounds and for interim attorney's fees on the successfully litigated due process claim sustained by the Louisiana Supreme Court.

(c) Plaintiff's Motions for Partial Summary Judgment as to Liability and for Interim Award of Attorney's Fees:

Simultaneously with his Motion to Reopen and Lift Stay, plaintiff filed motions for partial summary judgment as to liability, 17-A, *infra*, on his successfully litigated due process claim and for an interim award of attorney's fees under 42 U.S.C. § 1988, 24-A, *infra*, the latter documented and apportioned in accordance with the rules of *Henseley v. Eckerhart*, 461 U.S. 424, 433 (1983), and *Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980).

A certified copy of the Louisiana Supreme Court's opinion and final decree in *Allen v. Louisiana State Board of Dentistry* was attached to plaintiff's motion for partial summary judgment as to liability. Plaintiff Allen invoked the well-settled rule that cross-forum preclusion is applicable in Section 1983 actions under *Allen v. McCurry*, 449 U.S. 90, 94 (1982).

The affidavit of William D. Allen, D.D.S., the federal plaintiff herein, was attached to his motion for an interim award of attorney's fees, 28-A, *infra*. It avers that as of June 26, 1990, "I have expended over ONE HUNDRED TWENTY THOUSAND AND NO/100 ($120,000.00) DOLLARS to defend myself against charges filed against my

[sic] by the Louisaina [sic] Board of Dentistry." *Id.* The affidavit continues:

> "My financial resources are completely exhausted and I am in desperate need of an interim award of attorney's fees from the federal court on my successfully litigated due process claim so that I can continue to defend myself against the Board's unlawful procedures against me."

29-A, *infra.*

(d) The District Court's Ruling:

On October 16, 1990, the district court denied plaintiff's motion to reopen and lift stay, 11-A, *infra.* The reasons given by the court below, in their entirety, are as follows:

> "The Louisiana State Board of Dentistry has not rendered its final decision regarding the plaintiff. However, it did act on the plaintiff's motion to recuse, granting the motion and recusing the members of the board who are defendants in the lawsuit in order to avoid any appearance of impropriety. Further, the state proceedings herein are still pending.
>
> "Because the state proceedings are ongoing, the Court finds that the stay should remain in place until such proceedings are fully and finally disposed of by the state court. At that time, plaintiff can renew his motion to reopen, along with motions for summary judgment and for attorney's fees."

(e) The Fifth Circuit's Ruling:

The Fifth Circuit affirmed, holding that the district court had not abused its discretion in refusing to lift the stay "under the principles enunciated in the Supreme Court's *Colorado River* decision. 5-A, *infra*. The Fifth Circuit emphasized that 42 U.S.C. § 1988 says "may" not "must." *Id.* at 3-A, 4-A. As the Fifth Circuit saw it, "Appellant presents no basis whatsoever for this court to conclude the circumstances warranting abstention in *Allen I* have changed other than the fact that he has prevailed on a procedural due process claim in the state courts . . . . " *Id.* at 7-A. As to Allen's financial need for an interim award of fees under § 1988, the Fifth Circuit stated: "His sole evidence of financial need is a bald assertion of such in an affidavit." *Id.* at 8-A.

REASONS FOR GRANTING WRIT

A. The Fifth Circuit's Ruling Conflicts With Decisions of This Court and Other Circuit Courts of Appeals.

The Fifth Circuit's ruling is a plain "abdication of the 'virtually unflagging obligation . . . to exercise the jurisdiction given' the federal courts," *Deakins v. Monaghan*, 484 U.S. 193, 204 (1988), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); conflicts with this Court's unanimous decision reversing the Fifth Circuit's crabbed construction of 42 U.S.C. § 1988 in *Texas Teachers Ass'n v. Garland School Dist.*, 489 U.S. 782 (1989); undermines the Congressional mandate of attorney fee awards to prevailing civil rights litigants; and conflicts with this Court's holding that "in the

absence of special circumstances a district court not merely 'may' but *must* award fees to the prevailing plaintiff," *Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989), and with circuit court of appeals' decisions holding that a court may not deny attorney's fees solely because 42 U.S.C. § 1988 grants the court discretion to do so.

B. The Question Is Substantial.

This is the first case to reach this Court where a § 1983 plaintiff has prevailed in the State's Highest Court following *Colorado River* abstention. Whether pursuit of a fee award must await another five years' abstention is an important federal question that should be settled by this Court, lest federal civil rights litigants be deprived of the Congressional promise of financial resources to fend off unconstitutional state action.

1. In *Deakins v. Monaghan*, all of the Justices contemplated plaintiff's return to federal court should he succeed in state court. Justice Blackmun said for the Court (484 U.S. at 204):

> "[W]e note that a sizeable portion of the relief sought in the federal complaint is intended to compensate respondents for injuries allegedly sustained in violation of federal constitutional rights. There can be no question that respondents have alleged injuries under federal law sufficient to justify the District Court's retention of jurisdiction."

Justice Blackmun's opinion in *Deakins* obviously contemplates "the federal proceeding recomenses in the District Court," 484 U.S. at 204, when plaintiff succeeds in the

state forum. So too, Justices White and O'Connor, both of whom anticipate "the subsequent pursuit of a damages action in federal court in the event that the state court holds that a violation of constitutional rights took place." 484 U.S. at 206 (White, J., joined by O'Connor, J., concurring). Jurisdiction was retained here. Allen does not seek damages at this stage; he is willing to await the outcome of the new administrative hearing to determine quantum, although damages are due for denial of due process, even if his loss of license is otherwise justified. *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Laje v. R.E. Thomason General Hospital*, 665 F.2d 724 (5th Cir. 1982).

2. Whatever disruption to the administrative process – and we see none – caused by an award of attorney's fees against the Board is hardly a ground for refusing to enforce the mandate of Congress: "[T]he award of counsel fees *pendente lite* would be 'especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on *all* issues.' " *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980), quoting S. Rep. No. 94-1011, p. 5 (1976) (legislative history of § 1988). "Piecemeal litigation of the issues involved in this case is thus inevitable." *Deakins v. Monaghan*, 484 U.S. at 204.

3. The Fifth Circuit's denial of access to a fee award because Allen succeeded on only "one of twenty-four claims presented in his sec. 1983 lawsuit in federal court," 7-A, *infra*, is patently in conflict with this Court's unanimous ruling in *Texas Teachers Ass'n v. Garland School Dist.*, 489 U.S. 782 (1984), that

> "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind."

489 U.S. at 791-92, quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). The First Circuit, we quickly add, has reached precisely the result we seek here. *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984); *Exeter-West Greenwich Regional Sch. v. Pontarelli*, 788 F.2d 47 (1st Cir. 1986).

4. The very purpose of the stay issued in this case was to permit Louisiana state courts in the first instance to adjudicate "the gravamen of Allen's § 1983 action before this court." *Allen v. Louisiana State Board of Dentistry*, 835 F.2d 100, 105 (5th Cir. 1988). Obviously, such a stay order – as this Court contemplates it – anticipates plaintiff's return to federal court in pursuit of damages and attorney's fees upon successful, final vindication in state court. Allen's success against the Board on his due process claim is a matter of public record. 543 So.2d 908 (La. 1989). The Fifth Circuit's ruling denying Allen access to his hard earned fee award is in conflict with the holding of seven other circuit courts of appeals. *Vide: Forest Hills Utility Co. v. City of Heath, Ohio*, 539 F.2d 592, 596 (6th Cir. 1976); *Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1008, 1023 (3d Cir. 1981); *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982); *Pollock v. Baxter Manor Nursing Home*, 716 F.2d 545 (8th Cir. 1983); *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985); *Crane v. Fauver*, 762 F.2d 325 (3d Cir. 1985); *Lumen Const., Inc. v. Brant Const. Co., Inc.*, 780 F.2d 691, 698 (7th Cir. 1985); *Stathos v. Bowden* and *Exeter-West Regional Sch. v. Pontarelli, supra* (1st Cir.); and, most

recently, Judge Feinberg's analysis in *Temple of The Lost Sheep v. Abrams*, 930 F.2d 178, 184 (2d Cir. 1991) ("the opportunity for returning to federal court to receive monetary or injunctive relief for any constitutional violations found by the state court"), *cert. denied* 112 S.Ct. 193 (1991).

Furthermore, Allen's request for partial summary judgment as to liability, based upon cross-forum preclusion against the Board, see *Allen v. McCurry*, 449 U.S. 90, 94 (1982), is identical to that granted in *Mundich Developers, Inc. v. Hunziker*, 662 F.Supp. 1513 (S.D.N.Y. 1985); *Benjamin v. Coughlin*, 643 F.Supp. 351 (S.D.N.Y. 1986); and *Healy v. Town of Pembroke Park*, 643 F.Supp. 1208 (S.D. Fla. 1986), *aff'd* 831 F.2d 989 (11th Cir. 1987).

5. *Allen I* makes clear that the *Colorado River* test must "be applied in 'a pragmatic, flexible manner with a view to the realities of the case at hand.' " 835 F.2d at 104, quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983). We have no quarrel with this. But we submit that the stunning realities of this case are twofold: The Louisiana Supreme Court has now finally adjudicated a violation by the State Board of Dentistry and its prosecutor of Dr. Allen's constitutional right of due process of law.[2] Allen is thus seeking to enforce a

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[2] The Fifth Circuit's doubt, 8-A n.4, *infra*, that federal due process standards were applied by the Louisiana Supreme Court in condemning the Board's commingling of functions is strained, to say the least. Louisiana's Administrative Procedure Act, La. R.S. 49:960(A), which prohibits commingling of functions, is federal in origin. See Comment, *Louisiana's "New" Administrative Procedure Act*, 35 La. L. Rev. 629, 631 (1975). Louisiana's due process jurisprudence is likewise federal in

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solemn judgment of Louisiana's highest court in a federal forum that congress made available to him. Considerations of comity and of "Our Federalism" – not to mention the Full Faith and Credit Act, 28 U.S.C. § 1738 – cut in Allen's favor here. *Accord, Temple of The Lost Sheep v. Abrams*, 930 F.2d at 183-184 (per Feinberg, J.), *cert. denied* 112 S.Ct. 193 (1991).

The other stark reality of this case is the exhaustive length of Allen's struggle against the Louisiana State Board of Dentistry – now in excess of six years – and the extreme cash outlay for plaintiff – now in excess of $120,000. Appendix, 28-A, *infra*. It is grossly unfair for the Fifth Circuit to say that Allen's "sole evidence of financial need is a bald assertion of such in an affidavit." 8-A, *infra*. Allen's affidavit is uncontradicted in the record; worse yet, he has had no hearing on the matter as mandated by Congress under § 1988.[3]

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origin. See *Wilson v. City of New Orleans*, 479 So.2d 891, 901-02 (La. 1985), citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Matter of Rollins Environ. Services, Inc.*, 481 So.2d 113, 119 n.20 (La. 1985), citing *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962). Justice Cole's opinion in *Allen* cites federal due process authority, 543 So.2d at 914, citing *Grolier, Inc. v. Federal Trade Comm'n*, 615 F.2d 1215 (9th Cir. 1890), and relies on *Bruteyn v. State Dental Council & Examining Bd.*, 380 A.2d 497, 502 (Pa. Cmwlth. 1977), which, in turn, goes as far back as *Tumey v. Ohio*, 273 U.S. 510, 532 (1926), and *Withrow v. Larkin*, 421 U.S. 35 (1975), in reliance on *federal* due process standards.

[3] The Fifth Circuit says, "He did not contest assertions that he has continued to practice dentistry in Louisiana throughout the pendency of the state and federal proceedings." 8-A, *infra*.

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6. Finally, the Fifth Circuit not only walked on eggs around *Texas Teachers Ass'n v. Garland School Dist., supra,* but its insistence that 42 U.S.C. § 1988 is discretionary only – the statute says "may," not "must" – is in conflict with *Morscott, Inc. v. City of Cleveland,* 936 F.2d 271 (6th Cir. 1991), which counsel for Allen brought to the attention of the Fifth Circuit by letter a week after the oral argument therein:

> "the Supreme Court has held that although it is within the district court's discretion to award attorney's fees under section 1988, 'in the absence of special circumstances a district court not merely "may" but *must* award fees to the prevailing plaintiff. . . . ' *Independent Fed'n of Flight Attendants v. Zipes,* 491 U.S. 754, 761 (1989) (citing *Newman v. Piggie Park Enter.,* 390 U.S. 400 (1968) (emphasis in original)."

936 F.2d at 272 (parallel citations omitted). *Accord, Herrington v. County of Sonoma,* 883 F.2d 739 (9th Cir. 1989);

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The matter came up only during oral argument in the Fifth Circuit. Counsel for Dr. Allen told the Court that the only evidence of record on Allen's financial need was his affidavit, although it is of public record that it took another hard due process fight to fend off the Board's attempt to shut him down pending state judicial review. See *Allen v. Louisiana State Board of Dentistry,* 519 So.2d 1161 (La. 1988). At any rate, an affidavit is certainly more than "a bald assertion." It is a sworn statement, uncontradicted by counter affidavit in the record. And Allen's continuing to practice is irrelevant to his entitlement to a § 1988 fee award on his successfully litigated, final state court judgment sustaining his due process claim. That he has continued to practice hardly addresses the $120,000 already spent.

Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073, 1084-85 (7th Cir. 1987), *cert. dismissed* 485 U.S. 901 (1988); *Universal Amusement Co. v. Hofheinz*, 616 F.2d 202, 205 (5th Cir. 1980).

None of the grounds given by the district court below, or by the Fifth Circuit, justifies refusal to entertain Allen's motions for partial summary judgment as to liability and for an award of attorney's fees under § 1988. The lower courts' unflinching abstention is inconsistent with the Congressional policy of providing a federal forum for the vindication of federal constitutional rights. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). Considerations of judicial economy cannot override the Congressional enactment of a federal remedial scheme, including § 1988, for violation of federal constitutional rights. *Zwicker v. Koota*, 389 U.S. 241 (1976). Practicality, flexibility, and reality all combine, we submit, in favor of the limited exercise of federal jurisdiction requested by Allen.

CONCLUSION

Petitioner has done all that Your Honors have demanded of him. He has prevailed in Louisiana's Supreme Court on his federal constitutional claim. He respectfully requests that the doors of federal justice be reopened to him, pursuant to the Congressional mandate of 42 U.S.C. §§ 1983 and 1988. Considerations of comity and "Our Federalism" support his motion to lift the federal stay – as this Court and seven courts of appeals have applied *Colorado River* abstention.

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

PAUL R. BAIER
JAMES E. BOREN
Counsel for Petitioner

5 March 1992

William D. ALLEN, D.D.S.,
Plaintiff-Appellant,

v.

LOUISIANA STATE BOARD OF DENTISTRY, et al.,
Defendants-Appellees.

No. 90-3810.

United States Court of Appeals,
Fifth Circuit.

Dec. 17, 1991.

Paul R. Baier, Baton Rouge, La., for plaintiff-appellant.

S. Mark Klyza and Cornelius R. Heusel, Kullman, Inman, Bee, Downing & Banta, New Orleans, La., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REYNALDO G. GARZA, WIENER and BARKSDALE, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

This case involves an appeal from the denial of a motion to lift a stay pending the outcome of state proceedings. For the reasons stated below, we AFFIRM the district court's decision.

THE FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are reminiscent of a law school exam for a course in Federal Courts. Most of the facts and procedural aspects are

recited in a 1988 opinion of this court (*Allen I*) and a 1989 opinion of the Louisiana Supreme Court (*Allen II*). *See Allen v. Louisiana State Board of Dentistry*, 835 F.2d 100, 102 (5th Cir.1988); *Allen v. Louisiana State Board of Dentistry*, 548 So.2d 908, 909-11 (La.1989). We briefly discuss those facts necessary to a complete understanding of our decision today.

In 1985, appellee Louisiana State Board of Dentistry brought formal charges against appellant Dr. Allen alleging various violations of the Louisiana Dental Practices Act, LA.REV.STAT.ANN. SEC. 87:751 *et seq.* On February 18, 1986, appellant filed a 42 U.S.C. Sec. 1983 action against appellee in the United States District Court for the Eastern District of Louisiana. The state charges were heard on February 21-24, 1986 and appellant challenged their outcome based on the conflicting roles of the prosecutor as both the prosecutor in fact and the author of the State Board of Dentistry's decision. Because state proceedings were still pending as of March, 1987, the federal district court abstained following a motion to dismiss filed by appellee. We affirmed the abstention finding appellant had failed to exhaust his state appellate remedies. *See Allen I*, 835 F.2d at 103 (*citing Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608, 95 S.Ct. 1200, 1210, 43 L.Ed.2d 482 (1975)). Moreover, as to appellant's claims for money damages in the Sec. 1983 action, we affirmed the district court's abstention based on the Supreme Court decision in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). *Allen I*, 835 F.2d at 104-05.

Appellant, following our decision in *Allen I*, pursued the available appellate remedies under Louisiana state

law and achieved a ruling by that state's highest court that his due process rights had been violated by the dual role of the prosecutor in the original hearing. The Louisiana Supreme Court remanded for further proceedings before the Board of Dentistry and all parties agree these proceedings remain pending. Following the decision of the Louisiana Supreme Court, appellant filed a motion in the district court requesting the stay be lifted and that he be granted partial summary judgment and damages as to his due process claims, and that he be awarded interim attorney's fees under 42 U.S.C. sec. 1988. The district court refused to lift the stay and this refusal is the basis for appellant's current appeal.

THE LAW

In his reply brief, appellant concedes the only issue on appeal is whether the district court abused its discretion in denying his motion as it related to his claim for interim attorney's fees. As we understand appellant's position, 42 U.S.C. sec. 1988 requires this court to lift a stay, imposed on federal abstention grounds, for the sole purpose of awarding interim attorney's fees when a plaintiff has succeeded on one of over twenty claims in state court and all additional claims await resolution in state court.

Interim Attorney's Fees

42 U.S.C. sec. 1988 provides in relevant part:

> In any action or proceeding to enforce a provision of . . . [42 U.S.C. sec.] 1983 . . . the court, *in its discretion, may* allow the prevailing

> party . . . a reasonable attorney's fee as part of its costs.

(*emphasis added*)

The United States Supreme Court has indicated that, in federal litigation, where a party has succeeded on an important issue, even thought that party may fail on the remaining issues, an interim award of attorney's fees may be awarded by a court under sec. 1988. *Texas Teachers Ass'n v. Garland School Dist.*, 489 U.S. 782, 790, 109 S.Ct. 1486, 1492, 108 L.Ed.2d 866 (1989). This discretion is afforded the district courts to further the goal of ensuring "effective access to the judicial process" for those aggrieved of their civil rights. *See Cobb v. Miller*, 818 F.2d 1227, 1233 (5th Cir.1987) (discussing legislative history of sec. 1988). Thus in an appropriate case, interim attorney's may be awarded.[1] *See e.g., James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 858-59 (5th Cir.1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978) (interim award of fees appropriate in protracted, eleven-year Title VII litigation where liability issues settled); *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 633 (5th Cir.1983) (analogizing sec. 1988 to Title VII and holding district court required to award interim fees or explain denial of same where Title VII plaintiffs afforded relief on remand).

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[1] We express no views as to the appropriateness of an award of interim attorney's fees to appellant. Moreover, we express no views in this opinion on the extensively briefed issue of whether or not appellant is a "prevailing party" for the purposes of interim attorney's fees under sec. 1988.

Unlike the cases dealing with a district court's discretion to award interim attorney's fees in federal litigation, appellant's situation present a somewhat different scenario. The district court below did not refuse to award interim attorney's fees, but rather refused to lift a stay, imposed several years earlier and upheld by this court in *Allen I*, pending the outcome of state court litigation. Thus we turn to the question of whether the district court abused its discretion by refusing to lift the stay, proceeding within the framework of the interim attorney's fee context.[2]

Continued Abstention

In *Allen I*, we upheld the district court's abstention and imposition of stay based on the principles enunciated in the Supreme Court's *Colorado River* decision.[3] *Allen I*,

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[2] While to some this may seem to be two sides of the same coin, it is clear to us that a district court, in the exercise of its discretion, might refuse to lift a stay without ever reaching the merits of an application for interim attorney's fees, particularly in a situation where such an application is only one of numerous issues placed before a court in a motion to lift a stay. Indeed, this is precisely what we today conclude the district court properly did. We do not foreclose the possibility of a fact situation wherein a district court might properly be held to have abused its discretion in refusing to lift a stay precisely due to the propriety of an application for interim attorney's fees. As will be demonstrated *infra*, however, such a fact situation is not presented by this case.

[3] In *Allen I*, appellant additionally sought to enjoin the state administrative proceedings pending against him. We refused to grant appellant his desired relief and upheld the

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835 F.2d at 104-05. We observed that "wise judicial administration, giving rise to conservation of judicial resources and comprehensive litigation" justified abstention. *Id.* at 104 (*quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952), *quoted in Colorado River*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483). In particular, we recognized the factors identified in *Colorado River* and its progeny which weighed in favor of abstention. These included "the desirability of avoiding piecemeal litigation, the inconvenience of the federal forum, and the order in which jurisdiction was obtained by the concurrent forums" in addition to considerations of the state or federal source of the governing law and the extent to which "the state court proceedings could adequately protect the federal plaintiff's rights." *Id.*

Applying the *Colorado River* abstention factors in a "pragmatic, flexible manner with a view to the realities of the case at hand," we found the abstention appropriate. *Allen I*, 835 F.2d at 104. We noted the extensive discovery which had taken place at the state level and the adequacy of the state procedures in protecting appellant's rights. *Id.* Moreover, we recognized the inextricable intertwining of the issues presented in appellant's sec. 1983 claims and his issues presented at the state level. *Id.* at 105. Finally, we found appellant's federal claims "vexaitous and reactive" and concluded the exceptional circumstances

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district court's decision to abstain based upon the principles enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Allen I*, 835 F.2d at 103.

required to stay federal litigation pending the outcome of state proceedings were present. *Id.*

Appellant presents no basis whatsoever for this court to conclude the circumstances warranting abstention in *Allen I* have changed other than the fact that he has prevailed on a procedural due process claim in the state courts, one of twenty-four claims presented in his sec. 1983 lawsuit in federal court. We do not diminish the significance of this victory for appellant. *See Estate of Farrar v. Cain,* 941 F.2d 1311, 1315 (5th Cir.1991) (constitutional violation never *de minimus*) (*quoting Lewis v. Woods,* 848 F.2d 649, 651 (5th Cir.1988)). Yet we reject appellant's contention that this victory is sufficient for us to conclude that the district court abused its discretion in refusing to lift the stay. That is to say, we reject the contention that a district court abuses its discretion *per se* when it refuses to lift a stay and the basis for the requested lifting is the partial granting of a summary judgment in order to secure an interim award of attorney's fees. Because of the overwhelming presence of the identical factors which counselled initially for the imposition of a stay, the lifting of the stay at this point would be tantamount to vacating our decision in *Allen I.* Moreover, lifting the stay for the sole purpose of determining the issue of attorney's fees would directly contribute to the very piecemeal litigation abstention was in part designed to prevent. *See Allen I,* 835 F.2d at 104.

We emphasize that our ruling today is limited to the facts of appellant's particular case. He has numerous issues awaiting state proceedings and these are the basis

of the numerous unsettled claims in his sec. 1983 complaint. His sole evidence of financial need is a bald assertion of such in an affidavit. He did not contest assertions that he has continued to practice dentistry in Louisiana throughout the pendency of the state and federal proceedings. The claim upon which appellant acquired relief in state court was one which was not part of his original federal complaint but arose only after the initial state administrative proceedings were completed. Moreover, we are not persuaded the Louisiana Supreme Court even based its decision on federal constitutional grounds, a fact which would preclude the granting of summary judgment and award of attorney's fees in the first instance.[4] We do not rely on any particular one of these

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[4] Our reading of the decision of the Louisiana Supreme Court in *Allen II* indicates that court based its findings on the literal wording of the Louisiana Administrative Procedures Act and *notions* of due process. The Court stated:

> In short, we find the commingling of prosecutorial and adjudicative functions violates both the letter of the Louisiana Administrative Procedures Act and the due process goals it was designed to further.

Allen II, 543 So.2d at 913.

What we find disturbing about this passage is that it creates a great deal of uncertainty as to whether or not the Louisiana Supreme Court based its decision on state or federal due process grounds, and, moreover, whether it based its decision primarily on state statutory grounds as opposed to any due process grounds at all. Is the Act designed to further the state due process goals only? If so, it would necessarily include the breadth of the protections of the federal constitution, but did the Louisiana Supreme Court base its findings of

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facts in our decision today but rather relate them for purposes of describing the context within which the district court acted.

While numerous factors are considered in the decision to continue to abstain from hearing a case, we are

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the due process violation on protections afforded by the state constitution that are greater than those provided by the federal constitution?

While the decision in *Allen II* clearly relies on the holding in *Bruteyn v. State Dental Council & Examining Bd.*, 32 Pa.Cmwlth. 541, 380 A.2d 497, 502 (1977), the dissent of Justice Calogero clearly treats that case as based on Pennsylvania law. *See Allen II*, 543 So.2d at 918 ("If indeed we are to rely on Pennsylvania law as persuasive authority for resolving this issue, it would appear [other Pennsylvania cases are] more factually similar than *Bruteyn*.") Moreover, the concurring opinion of Justice Dennis indicates that as to the alleged illegal search claims of appellant, the Louisiana Supreme Court relied on state constitutional grounds. *See Allen II*, 543 So.2d at 917 (majority incorrectly concludes Louisiana constitutional not broader than U.S. constitution). Finally, appellant clearly alleged violations of both the state and federal due process clauses in the state proceedings.

We do not intend to make any expression regarding the extent to which this matter is to be resolved one way or another. We merely point out that the issue is not clear and could lead a district court to request some clarification on the matter. *See e.g., California v. Krivda*, 409 U.S. 33, 35, 93 S.Ct. 32, 32-33, 34 L.Ed.2d 45 (1972) (remand necessary to determine basis of California Supreme Court ruling for purposes of federal jurisdiction). This aspect of the state court decision merely contributes to a factual situation which we find does not compel us to conclude the district court abused its discretion in refusing to lift the stay.

unpersuaded the particular facts of this case require us to conclude the district court abused its discretion when it refused to lift the stay. We reiterate that our ruling is not meant to indicate that a district court never abuses its discretion when it refuses to lift a stay based upon a request for interim attorney's fees; we see no reason for a refusal to lift a stay simply because the person seeking to have it lifted is doing so to seek an interim award of attorney's fees. This fact, however, does not diminish the need for a district court to completely and thoroughly review the relevant factors under the principles enunciated in *Colorado River* and its progeny, or any other basis for an initial stay, in light of the totality of the circumstances. As we have stated, that review here has not changed in any meaningful way from our decision in *Allen I*. For these reasons, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM D. ALLEN, D.D.S. (Filed Oct 16, 90)

versus

LOUISIANA STATE BOARD OF DENTISTRY, et al

RULING ON MOTION

Plaintiff, Dr. William D. Allen ("Dr. Allen") has filed a motion to reopen and lift the stay of this action in order that he be allowed to file a motion for summary judgment as to liability and for an interim award of attorney's fees. Defendants oppose the re-opening of this matter and the lifting of the stay at this time. On May 3, 1988, the Court entered an order staying further action in this Court pending final state administrative disposition. Plaintiff seeks to have the matter reopened and the stay lifted at this time. The Louisiana State Board of Dentistry has not rendered its final decision regarding the plaintiff. However, it did act on the plaintiff's motion to recuse, granting the motion and recusing the members of the board who are defendants in the lawsuit in order to avoid any appearance of impropriety. Further, the state court proceedings herein are still pending.

Because the state proceedings are ongoing, the Court finds that the stay should remain in place until such proceedings are fully and finally disposed of by the state court. At that time, plaintiff can renew his motion to reopen, along with the motions for summary judgment and for attorney's fees.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of plaintiff Dr. William D. Allen to reopen and lift stay be and is hereby DENIED.

New Orleans, Louisiana, this 16 day of October, 1990.

/s/ Marcel Livaudais
MARCEL LIVAUDAIS, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM D. ALLEN, D.D.S.	*	CIVIL ACTION
VERSUS		
LOUISIANA STATE BOARD OF DENTISTRY, DR. J. ROY CHUSTZ, DR. N. FRANCIS LABORDE, GUY WOOTAN, KENNETH M. BOUDREAUX, R.D.H., DR. LIONEL L. DE LA HOUSSAYE, DR. RUSSELL R. DIMARCO, DR. MERRICK A. DUGAL, JR., DR. BENNETT P. FONTENOT, DR. RALPH B. KING, JR., DR. JOSEPH M. KOCHANSKY, DR. HERMAN O. BLACKWOOD, III, DR. DAVID E. SIMMONS, AND DR. JAMES P. TOMASZEWSKI, EACH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES	*	NUMBER 86-0623
	*	SECTION "E"
	*	MAGISTRATE 1

MOTION TO REOPEN AND LIFT STAY

(Filed July 12, 1990)

Plaintiff, Dr. William D. Allen, by his undersigned attorneys of record, E. Wade Shows (trial attorney) and Paul R. Baier, moves this Court to reopen this matter and lift the stay or proceedings previously entered by the Court so that plaintiff may file a motion for partial summary judgment as to liability on his due process claim and for an interim award of attorney's fees, and as grounds therefor respectfully states:

1. This cause of action was brought pursuant to 42 U.S.C. § 1983 and requested, *inter alia*, declaratory and injunctive relief prohibiting the defendant Louisiana State Board of Dentistry, its defendant Board members, and its prosecutor defendant, Guy Wootan, from unconstitutionally commingling prosecutorial and adjudicative functions by defendant Guy Wootan's drafting the decision suspending plaintiff's license to practice dentistry. See paragraphs 18, 21, 23(ii), Second Supplemental and Amended Complaint filed September 18, 1986. Plaintiff also prayed for money damages for violation of his procedural due process rights and for an award of attorney's fees. *Id.*, paragraph 25(b), 26(b), 27.

2. On February 26, 1987, this Court entered an order abstaining from hearing this cause until state court proceedings are no longer pending. A copy of this Court's abstention order is attached hereto.

3. On May 1, 1989, the Louisiana Supreme Court reversed the decision of defendant Louisiana State Board of Dentistry suspending plaintiff's license to practice for violation of plaintiff's constitutional right to due process of law. See 543 So.2d 908. A certified copy of the Louisiana Supreme Court's opinion and judgment is attached as Appendix A to Plaintiff's Motion for Partial Summary Judgment As to Liability, a copy of which is attached hereto. The Louisiana Supreme Court sustained plaintiff's Fourteenth Amendment claim that the commingling by the State Board of Dentistry and defendant Guy Wootan of prosecutorial and adjudicative functions violated plaintiff's constitutional right due to process of law.

4. On September 11, 1989, the Louisiana Supreme Court denied rehearing, rendering its May 1, 1989, decision a final judgment regarding violation of plaintiff's due process rights.

5. As is more fully elaborated in the memorandum and attachments filed in support of reopening and lifting of stay, plaintiff is entitled to a partial summary judgment as to liability against defendants on plaintiff's procedural due process claim and interim award of attorney's fees, pursuant to 42 U.S.C. §1988, so as to allow Dr. Allen to defend himself at the administrative rehearing ordered by the Louisiana Supreme Court and scheduled for August 4, 1990.

WHEREFORE, Dr. William D. Allen prays for a reopening of this case and a lifting of the stay order previously issued so as to allow plaintiff to file a motion for partial summary judgment and for an interim award of attorney's fees on his due process claim sustained by the Louisiana Supreme Court.

Baton Rouge, Louisiana, this 10th day of June, 1990.

Respectfully submitted,

SHOWS, COHN & CALI
644 St. Ferdinand
P. O. Drawer 4425
Baton Rouge, Louisiana 70821
(504) 346-1461

/s/ E. Wade Shows
E. WADE SHOWS

/s/ Paul R. Baier
PAUL R. BAIER

CERTIFICATE

I hereby certify that a copy of the Motion to Reopen and Lift Stay has this date been served by placing same in the U.S. Mail, postage prepaid, upon P. J. Stakelum, III, Suite 2200, 1515 Poydras Street, New Orleans, Louisiana 70112, attorney of record for defendants.

Baton Rouge, Louisiana, this 10th day of July, 1990.

/s/ E. Wade Shows
E. WADE SHOWS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM D. ALLEN, D.D.S.	*	CIVIL ACTION
VERSUS		
LOUISIANA STATE BOARD OF DENTISTRY, DR. J. ROY CHUSTZ, DR. N. FRANCIS LABORDE, GUY WOOTAN, KENNETH M. BOUDREAUX, R.D.H., DR. LIONEL L. DE LA HOUSSAYE, DR. RUSSELL R. DIMARCO, DR. MERRICK A. DUGAL, JR., DR. BENNETT P. FONTENOT, DR. RALPH B. KING, JR., DR. JOSEPH M. KOCHANSKY, DR. HERMAN O. BLACKWOOD, III, DR. DAVID E. SIMMONS, AND DR. JAMES P. TOMASZEWSKI, EACH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES	*	NUMBER 86-0623
	*	SECTION "E"
	*	MAGISTRATE 1

MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

(Filed July 12, 1990)

Plaintiff, Dr. William D. Allen, by his undersigned attorneys of record, E. Wade Shows (trial attorney) and Paul R. Baier, moves pursuant to Fed. R. Civ. P. 56(a) for partial summary judgment as to liability in his favor against defendants, Louisiana State Board of Dentistry, Dr. J. Roy Chustz, Dr. N. Francis Laborde, Guy Wootan, Kenneth M. Boudreaux, R.D.H., Dr. Lionel L. de la Houssaye, Dr. Russell R. DiMarco, Dr. Merrick A. Dugal,

Jr., Dr. Bennett P. Fontenot, Dr. Ralph B. King, Jr., Dr. Joseph M. Kochansky, Dr. Herman O. Blackwood, III, Dr. David E. Simmons, and Dr. James P. Tomaszewski, each individually and in their official capacities, and as grounds therefor respectfully states:

1. This cause of action was brought pursuant to 42 U.S.C. Sec. 1983 and requested, *inter alia*, declaratory and injunctive relief prohibiting the defendant Louisiana State Board of Dentistry, its defendant Board members, and its prosecutor defendant, Guy Wootan, from unconstitutionally commingling prosecutorial and adjudicative functions by defendant Guy Wootan's drafting the decision suspending plaintiff's license to practice dentistry. See paragraphs 18, 21, 23(ii), Second Supplemental and Amended Complaint filed September 18, 1986. Plaintiff also prayed for money damages for violation of his procedural due process rights and for an award of attorney's fees. *Id.*, paragraphs 25(b), 26(b), 27.

2. On February 26, 1987, this Court entered an order abstaining from hearing this cause until state court proceedings are no longer pending.

3. On May 1, 1989, the Louisiana Supreme Court reversed the decision of defendant Louisiana State Board of Dentistry suspending plaintiff's license to practice for violation of plaintiff's constitutional right to due process of law. See 543 So.2d 908. A certified copy of the Louisiana Supreme Court's opinion and judgment is attached hereto as Appendix A. The Louisiana Supreme Court sustained plaintiff's Fourteenth Amendment claim that the commingling by the State Board of Dentistry and defendant Guy Wootan of prosecutorial and adjudicative

functions violated plaintiff's constitutional right due to process of law.

4. On September 11, 1989, the Louisiana Supreme Court denied rehearing, rendering its May 1, 1989, decision a final judgment regarding violation of plaintiff's due process rights.

5. As is more fully elaborated in the Memorandum of Law filed in support of this motion, the judgment of the Louisiana Supreme Court sustaining plaintiff's Fourteenth Amendment due process claim is *res judicata* and the defendants are precluded herein from relitigating this claim as a matter of law.

There is no genuine dispute as to the foregoing facts which establish as a matter of law that plaintiff is entitled to a partial summary judgment as to liability against defendants on the claim asserted in paragraph 18 of Plaintiff's Second Supplemental and Amended Complaint, *viz.*:

"18.

> "The Board's lawyer and prosecutor, Mr. Guy Wootan, drafted the final decision of March 24, 1986, revoking plaintiff's license. This mixing of prosecutorial and adjudicative functions denied plaintiff due process of law."

WHEREFORE, Dr. William D. Allen prays for a partial summary judgment in his favor and against defendants for violation of plaintiff's Fourteenth Amendment procedural due process rights as declared by the Louisiana Supreme Court. Plaintiff further prays, pursuant to Fed. R. Civ. P. 56(c), that the Court set this matter for jury trial to determine the amount of damages recoverable by

plaintiff on his Fourteenth Amendment due process claim as soon as the Court's schedule reasonably allows.

Baton Rouge, Louisiana, this 10th day of July, 1990.

By Attorneys,

SHOWS, COHN & CALI
644 St. Ferdinand
P. O. Drawer 4425
Baton Rouge, Louisiana 70821
(504) 346-1461

/s/ E. Wade Shows
E. WADE SHOWS
Trial Attorney

/s/ Paul R. Baier
PAUL R. BAIER

CERTIFICATE

I hereby certify that on the 10th day of July, 1990, a copy of the foregoing Motion for Partial Summary Judgment and all supporting memoranda and documents were mailed to P. J. Stakelum, III of Wootan & Stakelum, Suite 2200, 1515 Poydras Street, New Orleans, Louisiana 70112, attorney for defendants.

Baton Rouge, Louisiana, this 10th day of July, 1990.

/s/ E. Wade Shows
E. WADE SHOWS
Trial Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM D. ALLEN, D.D.S.	*	CIVIL ACTION
VERSUS	*	NUMBER 86-0623
LOUISIANA STATE BOARD OF DENTISTRY, DR. J. ROY CHUSTZ, DR. N. FRANCIS LABORDE, GUY WOOTAN, KENNETH M. BOUDREAUX, R.D.H., DR. LIONEL L. DE LA HOUSSAYE, DR. RUSSELL R. DIMARCO, DR. MERRICK A. DUGAL, JR., DR. BENNETT P. FONTENOT, DR. RALPH B. KING, JR., DR. JOSEPH M. KOCHANSKY, DR. HERMAN O. BLACKWOOD, III, DR. DAVID E. SIMMONS, AND DR. JAMES P. TOMASZEWSKI, EACH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES	*	SECTION "E" MAGISTRATE 1

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

In conjunction with the motion of Dr. William D. Allen for partial summary judgment as to liability on plaintiff's due process claim, and in compliance with Local Rule 3.9 of the Local Rules of the United States District Court for the Eastern District of Louisiana, the plaintiff contends that there is no genuine issue as to the following material facts:

1.

The opinion and judgment of the Louisiana Supreme Court in *Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908 (No. 88-C-2736), a certified copy of which is attached to plaintiff's motion for partial summary judgment as Appendix A, sustained the same procedural due process Fourteenth Amendment constitutional claim as that asserted in Paragraph 18 of plaintiff's Second Supplemental and Amended Complaint filed herein, viz.:

"18.

> "The Board's lawyer and prosecutor, Mr. Guy Wootan, drafted the final decision of March 24, 1986, revoking plaintiff's license. This mixing of prosecutorial and adjudicative functions denied plaintiff due process of law."

Respectfully submitted,

SHOWS, COHN & CALI
644 St. Ferdinand
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Baton Rouge, Louisiana 70821
(504) 346-1461

/s/ E. Wade Shows
E. WADE SHOWS
Trial Attorney

CERTIFICATE

I hereby certify that on this date a copy of the foregoing Statement of Material Facts as to Which There is No Genuine Issue was mailed to P. J. Stakelum, III, Suite 2200, 1515 Poydras Street, New Orleans, Louisiana 70112, attorney of record for defendants.

Baton Rouge, Louisiana, this 10th day of July, 1990.

/s/ E. Wade Shows
E. WADE SHOWS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM D. ALLEN, D.D.S.	*	CIVIL ACTION
VERSUS	*	NUMBER 86-0623
LOUISIANA STATE BOARD OF DENTISTRY, DR. J. ROY CHUSTZ, DR. N. FRANCIS LABORDE, GUY WOOTAN, KENNETH M. BOUDREAUX, R.D.H., DR. LIONEL L. DE LA HOUSSAYE, DR. RUSSELL R. DIMARCO, DR. MERRICK A. DUGAL, JR., DR. BENNETT P. FONTENOT, DR. RALPH B. KING, JR., DR. JOSEPH M. KOCHANSKY, DR. HERMAN O. BLACKWOOD, III, DR. DAVID E. SIMMONS, AND DR. JAMES P. TOMASZEWSKI, EACH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES	*	SECTION "E" MAGISTRATE 1

MOTION FOR INTERIM AWARD OF ATTORNEY'S FEES

(Filed Jul 12, 90)

Plaintiff moves the Court for an Order awarding interim attorney's fees and other expenses in the above-styled cause pursuant to 42 U.S.C. § 1988 and as grounds therefore shows unto the Court as follows:

1. Plaintiff was represented in this cause by J. Peyton Parker, Jr., who has with the Court's consent withdrawn his appearance, and Professor Paul R. Baier, of the LSU Law Center, who continues to represent plaintiff in this action together with E. Wade Shows, Esq.

2. This cause of action was brought pursuant to 42 U.S.C. § 1983 and requested, *inter alia*, declaratory and injunctive relief prohibiting the defendant Louisiana State Board of Dentistry and its prosecutor, defendant Guy Wootan, from unconstitutionally commingling prosecutorial and adjudicative functions by defendant Wootan's drafting the decision suspending plaintiff's license to practice dentistry. See ¶¶18, 21, 23(ii), Second Supplemental and Amended Complaint, filed September 18, 1986.

3. On February 26, 1987, this Court entered an order abstaining from hearing this cause until state court proceedings are no longer pending.

4. On May 1, 1989, the Louisiana Supreme Court reversed the decision of defendant Louisiana State Board of Dentistry suspending plaintiff's license to practice for violation of plaintiff's constitutional right to due process of law. See 543 So.2d 908. The Louisiana Supreme Court sustained plaintiff's constitutional claim that the State Board and defendant Wootan's commingling of prosecutorial and adjudicative functions violated plaintiff's constitutional right to due process of law.

5. On September 11, 1989, the Louisiana Supreme Court denied rehearing, rendering its May 1, 1989, decision a final judgment.

6. The defendant, Louisiana State Board of Dentistry, has noticed an administrative rehearing of its charges against Dr. Allen for August 4, 1990, pursuant to the remand order of the Louisiana Supreme Court.

7. During the four years' pendency of state court proceedings challenging the defendant Board's suspension of plaintiff's license, plaintiff has incurred out-of-pocket costs and expenses, including attorney's fees, of ONE HUNDRED TWENTY THOUSAND FOUR HUNDRED FORTY-SIX AND 96/100 ($120,446.96) DOLLARS.

8. An interim award of attorney's fees is necessary to permit plaintiff to defend himself against the Board's reassertion of charges against him.

9. Plaintiff has achieved substantial success against the defendant State Board of Dentistry by resort to the Louisiana Supreme Court for vindication of his due process claim against the Board.

10. The reversal of defendant State Board's suspension of plaintiff's license and the dismissal on judicial review of nine (9) of the State Board's specifications of charges against Dr. Allen in the state courts constitutes substantial relief for which plaintiff is entitled to an award of reasonable attorney's fees pursuant to 42 U.S.C. § 1988, as prayed for in Plaintiff's Second Supplemental and Amended Complaint, ¶¶27, 28(5.).

11. Plaintiff's attorney, Paul R. Baier, expended a total of 318.5 hours in vindicating plaintiff's constitutional due process claim asserted in Paragraph 18 of Plaintiff's Second Supplemental and Amended Complaint, including his representation of Dr. Allen on this

due process claim in the state courts and his representation to date in this Court as evidenced by Paul R. Baier's affidavit and as itemized in Appendix A, attached hereto and incorporated by reference herein.

12. The prevailing market rate for the kind of quality of services furnished by plaintiff's counsel, Professor Paul R. Baier, in vindicating plaintiff's due process rights in the state court proceedings is $200.00 per hour, as evidence by affidavit of other knowledgeable counsel attached hereto as Appendix B, which multiplied by the total hours expended results in total attorney's fees of SIXTY-THREE THOUSAND SEVEN HUNDRED AND NO/100 ($63,700.00) DOLLARS, inclusive of hours expanded in preparation of motions to reopen, for partial summary judgment and the fee application itself and supporting memoranda.

WHEREFORE, plaintiff, William D. Allen, D.D.S., prays that there be judgment herein in his favor and against defendants, granting him an interim award of attorneys' fees in the amount of SIXTY-THREE THOUSAND SEVEN HUNDRED AND NO/100 ($63,700.00) DOLLARS.

Baton Rouge, Louisiana, this 10th day of July, 1990.

By Attorneys,

SHOWS, COHN & CALI
644 St. Ferdinand
P. O. Drawer 4425
Baton Rouge, Louisiana 70821
(504) 346-1461

/s/ E. Wade Shows
E. WADE SHOWS
Trial Attorney

/s/ Paul R. Baier
PAUL R. BAIER

CERTIFICATE

I hereby certify that on the 10th day of July, 1990, a copy of the foregoing Motion for Interim Award of Attorney's Fees and all supporting memoranda and documents were mailed to P. J. Stakelum, III of Wootan & Stakelum, Suite 2200, 1515 Poydras Street, New Orleans, Louisiana 70112, attorney for defendants.

Baton Rouge, Louisiana, this 11th day of July, 1990.

/s/ E. Wade Shows
E. WADE SHOWS

AFFIDAVIT OF WILLIAM D. ALLEN, D.D.S.
IN SUPPORT OF INTERIM
AWARD OF ATTORNEY'S FEES

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

I, William D. Allen, D.D.S., being duly sworn, do depose and say that:

I have expended over ONE HUNDRED TWENTY THOUSAND AND NO/100 ($120,000.00) DOLLARS to defend myself against charges filed against my [sic] by the Louisaina [sic] State Board of Dentistry.

The Louisiana Supreme Court has sustained my constitutional claim that the Board and its prosecutor Guy Wootan violated my due process rights in the manner in

which they proceeded against me in this matter. Two of my former assistants have confessed under oath to breaking into my office to get information they turned over to the Board's prosecutor Wootan, who used the information against me. They have also confessed under oath to perjury in this matter.

The new committee that will rehear the Board's charges against me consists of Board members who are defendants in the federal suit I have filed and who cannot possibly give me a fair hearing because of bias and prejudice against me.

My financial resources are completely exhausted and I am in desperate need of an interim award of attorney's fees from the federal court on my successfully litigated due process claim so that I can continue to defend myself against the Board of Dentistry's unlawful procedures against me.

Baton Rouge, Louisiana, this 26 day of June, 1990.

/s/ William D. Allen
WILLIAM D. ALLEN

SWORN TO AND SUBSCRIBED before me this 26th day of June, 1990.

/s/ Illegible
NOTARY PUBLIC
ss E. Wade Shows

Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

(2)

No. 91-1455

In The

Supreme Court of the United States

October Term, 1991

WILLIAM D. ALLEN, D.D.S.,

Petitioner,

versus

LOUISIANA STATE BOARD OF DENTISTRY, ET AL.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Shortly after the commencement of this §1983 civil rights suit, the district court abstained from hearing Petitioner's numerous constitutional claims against the Louisiana State Board of Dentistry, its members, and its counsel, pending the completion of Petitioner's disciplinary proceeding and judicial review in the state system. Thereafter, the Louisiana Supreme Court sustained a due process claim raised by Petitioner, reversed the Board's decision and ordered a *de novo* hearing of Petitioner's disciplinary proceedings. *Allen v. Louisiana State Board of Dentistry*, 543 So. 2d 908 (La. 1989). Despite the fact that state court proceedings remained ongoing, Petitioner moved to reopen this §1983 federal suit so that the parties could litigate piecemeal whether the Louisiana Supreme Court's ruling rendered Respondents liable on one of Petitioner's twenty-four civil rights claims and entitled him to damages and interim attorney's fees.

The question presented is whether, under *Colorado River* abstention, the district court's decision to deny Petitioner's motion to lift the stay because state court proceedings are still ongoing was a proper exercise of the district court's discretion demonstrating "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" or whether it constituted an abuse of discretion.

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STATEMENT OF THE CASE

In 1985, Respondent, Louisiana State Board of Dentistry ("Board") brought formal administrative charges against Petitioner alleging various violations of the Louisiana Dental Practice Act, La. Rev. Stat. Ann. §37:1751 *et seq.* In response to those charges, Petitioner filed the present 42 U.S.C. §1983 action against Respondent Board, its members, and its counsel, Guy Wootan ("Wootan"), alleging various violations of due process. Petitioner sought injunctive relief, four million dollars in damages, and attorney's fees. Petitioner's suit was filed on February 13, 1986, eight days before his disciplinary hearing.

Following the hearing, the Board sustained twenty-seven of the forty-five violations charged against Petitioner, imposed fines totaling $25,500 for the violations, ordered the suspension of Petitioner's license for ten years with an additional ten years probation, and ordered him to pay costs of $61,478.19. *After* reaching these determinations, the Board instructed Wootan to prepare its findings of fact and conclusions. Subsequently, Petitioner twice amended his §1983 complaint. In his Second Supplemental and Amended Complaint, which is presently before the district court, Petitioner sues the Board, its members, and Wootan, in both their individual and official capacity, alleging approximately twenty-four civil rights claims.[1] [Resp. App. 1A - 17A.] Petitioner seeks declaratory and injunctive relief, thirty-three and a half million dollars in damages and attorney's fees.

---

[1] For ease of reference, the Defendants will be collectively referred to as "Respondents."

Because state proceedings were pending as of March, 1987, the district court abstained following a motion to dismiss filed by Respondents. The Fifth Circuit affirmed the abstention, finding Petitioner had failed to exhaust his state appellate remedies. *Allen v. Louisiana State Board of Dentistry*, 835 F.2d 100 (5th Cir. 1988) (*Allen I*). With regard to Petitioner's §1983 claims for monetary damages, the Fifth Circuit affirmed the district court's abstention based on this Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

On May 1, 1989, the Louisiana Supreme Court ruled, *inter alia*, that Petitioner's right to due process had been violated as a result of the "commingling of functions" by Wootan who served as the Board's prosecutor at Petitioner's disciplinary proceedings and subsequently as drafter of the Board's decision. *Allen v. Louisiana State Board of Dentistry*, 543 So. 2d 908 (La. 1989) (*Allen II*). The Louisiana Supreme Court reversed the Board's decision and remanded the case for a hearing *de novo* on the existing factual record before a committee composed of dentists who had no involvement in the initial disciplinary proceeding.

On July 12, 1990, Petitioner moved the district court to lift its stay for the following purposes: (1) grant partial summary judgment on his "commingling claim" which constitutes one of his 24 civil rights claims in his Second Supplemental and Amended Complaint; (2) "set this matter for jury trial to determine the amount of damages recoverable by Plaintiff . . . ";[2] (3) award Petitioner an

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[2] Petitioner asserts that he "does not seek damages at this stage; he is willing to await the outcome of the new

(Continued on following page)

interim award of attorney's fees pursuant to 42 U.S.C. §1988. On October 16, 1990, the district court denied Petitioner's motions, holding that the stay must remain in place until completion of the state proceedings.

Following Petitioner's appeal, the Fifth Circuit affirmed, holding that the district court had not abused its discretion in refusing to lift the stay. *Allen v. Louisiana State Board of Dentistry*, 948 F.2d 946 (5th Cir. 1991) (*Allen III*). [Pet. App. 1-A - 10-A.] In reaching its conclusion, the appellate court determined that the identical factors which led it to affirm the district court's stay in *Allen I* still have an "overwhelming presence." Accordingly, Petitioner's success on his commingling claim in the state courts, by itself, was insufficient to establish that the district court abused its discretion in refusing to lift the stay while state proceedings are still pending. Additionally, the court noted that "lifting the stay for the sole purpose of determining attorney's fees would directly contribute to the very piecemeal litigation abstention was in part designed to prevent." [Pet. App. at 2-A.]

(Continued from previous page)

administrative hearing to determine quantum, . . . " [Pet. at 4.] By so arguing, Petitioner attempts to rewrite his pleadings to the district court. As reflected by Petitioner's appendix, he asked the district court to lift the stay in order to determine liability, *damages*, and attorney's fees against Respondents. [Pet. at 19-A, 20-A.]

REASONS FOR DENYING THE WRIT

A. *Allen III* Does Not Conflict With Decisions Of This Court Or Other Circuit Courts Of Appeal.

As set forth in detail by the Fifth Circuit, the district court's ongoing abstention in the present case is fully consistent with the teachings of *Colorado River* which provide for abstention based on "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* Citing *Colorado River Water Conservation District v. United States*, 424 U.S. at 817. The Fifth Circuit noted the factors identified in *Colorado River* and its progeny which weigh in favor of abstention. These factors included

> "the desirability of avoiding piecemeal litigation, the inconvenience of the federal forum, and the order in which jurisdiction was obtained by the concurrent forums" in addition to consideration of the state or federal source of the governing law and the extent to which "the state court proceedings could adequately protect the federal plaintiff's rights."

Id, citing Allen v. Louisiana State Board of Dentistry, 835 F.2d 100, 104 (5th Cir. 1988). The court further noted that the *Colorado River* test should "be applied in a pragmatic, flexible manner with a view of the realities of the case at hand." *Id.*

As noted by the Fifth Circuit, the realities of the present case are essentially the same as found in *Allen I*. The state court proceedings are significantly more developed than the federal proceedings and, as indicated by the Louisiana Supreme Court's rulings, the state courts are adequately protecting Petitioner's interests, which, as Petitioner notes,

includes allowing him to continue to practice. *Allen v. State Board of Dentistry*, 519 So. 2d 1161 (La. 1988); *Allen v. State Board of Dentistry*, 543 So. 2d 908 (1989). Also, Petitioner's numerous remaining §1983 claims are intertwined with state proceedings. Lastly, Petitioner's suit was and remains vexatious and reactive. [Pet. App. at 6-A.]

Moreover, the Fifth Circuit affirmed the district court's ongoing abstention without expressing a view as to the appropriateness of an interim award of attorney's fees or whether Petitioner is prevailing party pursuant to 42 U.S.C. §1988. *Id* at 4-A, n. 1. However, the appellate court noted

> it is clear to us that a district court, in the exercise of its discretion, might refuse to lift a stay without ever reaching the merits of an application for interim attorney's fees, *particularly in a situation where such an application is only one of numerous issues placed before a court in a motion to lift a stay*. Indeed, this is precisely what we today conclude the district court properly did. (Emphasis added.)

Id. at 5-A, n. 2.[3] Nevertheless, Petitioner's contentions that the district court abused its discretion and that this

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[3] The appellate court observed further that

> [w]e do not foreclose the possibility of a fact situation wherein a district court might properly be held to have abused its discretion in refusing to lift a stay precisely due to the propriety of an application for interim attorney's fees . . . however, such a fact situation is not presented by this case.

Allen v. Louisiana State Board of Dentistry., [Pet. App. at 5-A, n. 2.]

Court should grant his petition are based on the presumption that this Court's jurisprudence mandates his entitlement to interim attorney's fees as a prevailing party pursuant to 42 U.S.C. §1988. As set forth below, Respondents disagree.

Petitioner relies upon *Texas Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782 (1989), *Independent Fed'n. of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) and *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271 (6th Cir. 1991), in arguing that the decisions of the lower courts were incorrect. However, based on the distinguishing circumstances of the present case, the district court's ruling and appellate court's decision do *not* conflict with any of these cases. First, *Texas Teachers Assn.* focused on the determination of prevailing party status under 42 U.S.C. §1988 and did *not* involve the issue of *interim* attorney's fees. Also, in *Texas Teachers Assn.*, all issues of liability had been decided. In the present case, the state court proceedings are still ongoing and the district court, based on its abstention, has yet to address the issues of liability and prevailing party status, on any of Petitioner's 24 civil rights claims. Thus, until the district court has determined liability and considers whether Petitioner has prevailing party status, it is premature to say that either the district court or appellate court are in conflict with *Texas Teachers Assn.*

Likewise, *Allen III* is not in conflict with *Morscott, Inc.* and *Zipes*. These cases stand for the proposition that 42 U.S.C. §1988 is not discretionary when prevailing party status has been established. Insofar that the district court has not reached the issue of prevailing party status, based

on its stay, the Fifth Circuit's reference to the discretionary nature of attorney's fees under §1988 does not conflict with the above decisions.

> Moreover, *Allen III* is *not*, as alleged by Petitioner, in conflict with the holding of seven other circuit courts of appeals. *Vide*: *Forest Hills Utility Co. v. City of Heath, Ohio*, 539 F.2d 592, 596 (6th Cir. 1976); *Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1008, 1023 (3d Cir. 1981); *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982); *Pollock v. Baxter Manor Nursing Home*, 716 F.2d 545 (8th Cir. 1983); *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985); *Crane v. Fauver*, 762 F.2d 325 (3d Cir. 1985); *Lumen Const., Inc. v. Brant Const. Co., Inc.*, 780 F.2d 691, 698 (7th Cir. 1985); *Stathos v. Bowden and Exeter-West Regional Sch. v. Pontarelli, supra*, [728 F.2d 15] (1st Cir. [1984]); and, most recently, Judge Feinberg's analysis in *Temple of the Lost Sheep v. Abrams*, 930 F.2d 178, 184 (2d Cir. 1991) ("the opportunity for returning to federal court to receive monetary or injunctive relief for any constitutional violations found by the state court"), *cert denied*, 112 S. Ct. 193 (1991).

[Pet. at 10-11.] The above-cited appellate cases stand for the proposition that a federal court should stay, rather than dismiss, litigation pending final adjudication of all state issues. The cases do not stand for the proposition being urged by Petitioner that a federal court abuses its discretion *per se* by refusing to lift a stay to consider federal §1983 claims piecemeal.

B. Lifting The Stay To Determine Whether Petitioner Is Entitled To Interim Attorney's Fees Will Result In Unnecessary Piecemeal Litigation Which Abstention Was Designed To Avoid.

This Court has held that the *Colorado River* test should "be applied in a pragmatic, flexible manner with a

view of the realities of the case at hand." *Moses H. Core Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983).[4] Petitioner's impassioned insistence on lifting the stay is blind to the difficulties posed by his request. In essence, the district court will not be able to summarily grant Petitioner interim attorney's fees, but rather, as set forth below, it will be necessary for the parties to litigate piecemeal several issues which relate to his request.

In order for the district court to award interim attorney's fees, it would have to do the following:

1. Determine whether the Board or any of the individual Respondents, are liable under §1983;

2. Determine whether Petitioner is a "prevailing party" within the meaning of 42 U.S.C. §1988;

3. Determine which of the Respondents, sued in both their individual and official capacities, are liable under §1983, and apportion the liability of each; and

4. Apply the twelve-factor test of *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974) and determine the amount of attorney's fees to be awarded.

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[4] Throughout these proceedings, Petitioner has relied upon his alleged impoverishment cited in his affidavit as a basis for lifting the stay. While Respondents have yet to engage in discovery concerning Petitioner's alleged financial status because of the district court's stay, Respondents contest his alleged poverty and note his reluctant admission that his practice has continued without interruption throughout these proceedings.

By reviewing each of these in turn, it is clear that the district court did not abuse its discretion in refusing to lift its stay.

1. Liability Under §1983

Although the district court did not entertain Petitioner's motion for partial summary judgment on §1983 liability, Respondents wish to briefly note their disagreement that Petitioner can establish §1983 liability through application of res judicata to the Louisiana Supreme Court's decision on his commingling due process claim. As noted by the Fifth Circuit in *Folsom Inv. Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982) the federal district court in a §1983 action can only grant the same preclusive effect to state court judgments as would the courts of the judgment-rendering state. Thus the federal district court must "determine the preclusive effect of the Louisiana judgment by resort to the Louisiana law of res judicata." *Id.* at 1036.

Petitioner made no showing to the district court, appellate court or to this Court, that he is entitled to res judicata under Louisiana law.[5] Moreover, Respondents point out that in order for a party to be bound by the Louisiana Supreme Court's decision, the party must have

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[5] The cases cited by Petitioner as "identical" to the present case deal with the doctrine of res judicata under New York and Florida common law, not the civil law of Louisiana. [Pet. at 11.] As the Fifth Circuit recognized in *Folsom*, " 'the concept of res judicata (in Louisiana) more freely permits relitigation of a controversy than its common law counterpart.' " (Citation omitted.) *Folsom*, 681 F.2d at 1036.

been a party to the earlier proceedings. *Sider v. Valley Line*, 857 F.2d 1043, 1046 (5th Cir. 1988). In the present case, only the Board was a party to the state appeal. Thus, while the Board disputes that res judicata applies, and reserves its right to litigate that issue in the proper proceedings, it is clear that res judicata cannot apply to the remaining thirteen Respondents who are being sued in both their individual and official capacity, none of whom were party to the state appeal.

2. Prevailing Party Status

Before the district court can award interim attorney's fees, it must determine whether or not Petitioner is a "prevailing party" for purposes of §1988. He must be able to demonstrate to the district court that he has succeeded "on any significant issue in litigation which achieves some of the benefit [he] sought in bringing the suit." *Texas Teachers Assn. v. Garland School District*, 489 U.S. 791-792 (1989). A mere "technical victory" will not suffice; there must be a "material alteration of the legal relationship of the parties." *Id.* at 792-793.

Petitioner glibly asserts that he has proven everything necessary for the district court to declare him a prevailing party, but he has not. The district court has not reached this question yet, and for good reason. How, *at this stage*, can Petitioner's reversal be said to be anything but a "technical victory," which returns him to the beginning of the disciplinary proceedings, but grants him no other relief? How, exactly, has the "legal relationship" between these parties changed? At this stage, one cannot say. Petitioner remains charged with egregious violations

of professional conduct standards. He faces a rehearing on issues which are already supported by an extensive factual record. If, on rehearing, the charges against Petitioner are not sustained, then the prior reversal would be significant. On the other hand, if Petitioner suffers another adverse decision, and the decision is sustained on appeal, then the prior reversal is truly "technical." Respondents' point is that this inquiry is premature. If it is to be made at all, it should be made with the entire litigation in view, not just one part of one phase of it. The district court and appellate court correctly concluded that piecemeal adjudication of his §1983 commingling claim would be a waste of judicial resources.

3. Determination of §1983 Liability

Petitioner's argument ignores another critical issue which the application of res judicata to the Louisiana Supreme Court holding does not resolve and which the district court would be required to address: if Petitioner is entitled to attorney's fees, *by whom are they payable*? Petitioner has sued not only the Board as a body, but also twelve members of the Board and Wootan, both individually and in their official capacities. Of these numerous defendants, it is unknown if any of them are liable to Petitioner on his commingling claim. Yet, clearly before attorney's fees can be awarded, the district court must determine by whom they are payable, and it must apportion fees among liable defendants according to their official and individual liabilities.

In *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989), a §1983 action against the sheriff and clerk of court of

Jefferson Parish, Louisiana, the Fifth Circuit distinguished between defendants whose conduct is impacted by a court's decree and defendants whose conduct is not, holding that only the former have been "prevailed upon" for the purposes of §1988. 868 F.2d at 168-169. Exactly which Respondents does Petitioner claim are liable for his attorney's fees at this point? He does not say, but the district court would be required to make a finding.[6]

The district court would also have to determine which Respondents, if any, are liable for attorney's fees in their *individual capacities*. This Court has held that state officials may be individually liable for damages under §1983 and attorney's fees under §1988, upon a showing of objective or subjective bad faith. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Wood v. Strickland*, 420 U.S. 308 (1975). Assuming, *arguendo*, that Petitioner may be characterized as a "prevailing party" on his due process commingling claim, and assuming that he is entitled to recover attorney's fees, the district court would then be required to determine whether Wootan or the twelve individual members of the Board acted in bad faith.

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[6] On appeal, Petitioner's solution was to hold the Board liable for attorney's fees now and reserve the liability issue of the remaining Respondents for a later date. Petitioner's Reply Brief, p. 5. [Resp. App. 18A.] However, it must be noted that the Board has been judicially determined to be an arm of the state and therefore immune from such liability. *Neuwirth v. Louisiana State Board of Dentistry*, 845 F.2d 553, 556 (5th Cir. 1988). Thus, the only Respondent against whom Petitioner could arguably request attorney's fees based solely on the Louisiana Supreme Court's ruling has immunity.

Petitioner's claim, apparently, is that all Respondents acted in bad faith. However, the district court would still have to conduct a separate hearing to determine the individual liability of the various Respondents on this particular §1983 claim in order to award interim attorney's fees. In short, it is clear that Petitioner cannot establish liability solely on the Louisiana Supreme Court's ruling and it will be necessary for the district court to engage in piecemeal litigation to determine if Petitioner is entitled to the relief he presently seeks.

Finally, any award of attorney's fees to Petitioner would have to be *apportioned* by the district court. In *Dean v. Gladney*, 621 F.2d 1331 (5th Cir. 1980), a §1983 action against a city and its police officers, the court held not only that a plaintiff may not recover attorney's fees from defendants held not liable, but also held that any fee award must be apportioned among those defendants held liable, according to the degree of their culpability. 621 F.2d at 1337-1338, 1340. Again, Petitioner's claims of bad faith in this action are all encompassing. Thus, the district court would be required to determine on its own which defendants must pay attorney's fees, and the portion of the total fee to be borne by each.

4. Appropriate Amount of Attorney's Fees

Assuming *arguendo* that Petitioner can establish §1983 liability based on the Louisiana Supreme Court's ruling, can identify which defendants are liable and which are not, and can establish that he is a "prevailing party" at this stage of the proceeding, interim attorney's

fees would still be inappropriate. A review of the applicable Fifth Circuit jurisprudence demonstrates the difficulty which would be encountered by the district court were it to try to carve out such an award at this stage. In *Brantley v. Surles*, 804 F.2d 321 (5th Cir. 1986), the Fifth Circuit followed its previous holding in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and outlined the factors which must be considered in determining an attorney's fee under §1988:

1) time and labor required;
2) novelty and difficulty of legal questions;
3) skill necessary to perform the legal services;
4) preclusion of other employment by the attorney;
5) the customary fee for such work;
6) whether the fee is fixed or contingent;
7) time limitations imposed under the circumstances;
8) amount involved and results obtained;
9) experience, reputation and ability of the attorney;
10) "undesirability" of the case;
11) nature and length of the attorney/client relationship; and
12) awards in similar cases.

804 F.2d at 325. The eighth factor, *amount involved and results obtained*, has been held to be one of the factors to which the district court must pay "special heed." *Copper-*

Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 583 (5th Cir. 1980). Obviously, the amount involved and the results obtained from the Louisiana Supreme Court's ruling on Petitioner's due process commingling claim are impossible to gauge at this point. Only after Petitioner has concluded his state court proceedings will the district court be able to evaluate the significance, if any, of the favorable ruling Petitioner obtained from the Louisiana Supreme Court on the due process commingling claim.

Petitioner apparently dismisses any concern the trial court may have had over determining what fee to assess in this case, but the difficulty here is genuine. What, exactly, is the result Petitioner has obtained? If, after rehearing, the new panel sustains the charges, Petitioner's having obtained a rehearing is not as significant as it would have been if the charges had not been sustained. If, once the state proceedings are finished, Petitioner prosecutes this action and prevails on all, some, or none of his approximately twenty-four civil rights claims, is his due process commingling claim more significant, or less significant, than if he prevails on none of them? If he prevails on only a few of his federal claims, what weight should the trial court give to Petitioner's reversal then? What if Petitioner prevails in the district court on one or more of the claims which were rejected by the state court (and which he claims are preserved for re-litigation)? Clearly, the only way for the district court to determine *whether* Petitioner is entitled to attorney's fees and, if so, *how much*, is to take this litigation as a whole, *at its conclusion*. Only then can it properly assess the results obtained; only in the context of the *entire* litigation can the state court reversal of Petitioner's suspension be

placed in its proper context. *Johnson v. Georgia Highway Express, supra.* That time has not yet come.

Thus, the pendency of Petitioner's disciplinary rehearing, and the near certainty of another round of state court appeals, means that attempting to award attorney's fees now would embroil the federal courts in piecemeal adjudication of Petitioner's claims. As the Third Circuit held in *Williams v. Red Bank Board of Ed.*:

> . . . [I]t is difficult to see how the federal court could adjudicate [plaintiff's] constitutional claims and attorneys' fees until *after* all disciplinary proceedings have been finally completed. How could the damages be calculated, for example, until it is known whether [plaintiff] is to be "acquitted," discharged, or suffer a reduction in salary?

662 F.2d 1008, 1024 (3d Cir. 1981). [Emphasis in original]. Furthermore, *Williams* has been specifically endorsed by this Court. Contrary to Petitioner's assertions, this Court in *Deakins v. Monaghan*, 484 U.S. 193 (1988), explicitly approved abstention and the logic of *Williams*. In *Deakins*, this Court stated as follows:

> The Third Circuit rule [regarding abstention] is sound. It allows a parallel state proceeding to go forward without interference from its federal sibling, while enforcing the duty of federal courts "to assume jurisdiction where jurisdiction properly exists." (Citations omitted.)

Id. at 202-203. (*See also* the concurring opinion of Justices White and O'Connor in which Justice White specifically discusses the need for the federal court to abstain until

the *conclusion* of the state proceedings pursuant to *Colorado River*. *Id.* at 210, n. 5.)

CONCLUSION

Based on the above, Respondents submit that the Petition should be denied. The district court did not abuse its discretion in refusing to lift the stay until the state proceedings are completed. Petitioner's argument that the existing jurisprudence mandates that the district court was required to lift the stay is simply wrong. Without regard to the havoc he would create in the district court by litigating his claims piecemeal, Petitioner seeks license to shuffle back and forth between the state proceedings and the district court whenever the state proceedings produce a result which favorably relates to his federal suit. Such a scheme severely threatens the orderly administration of parallel proceedings and defeats the purpose of abstention. By applying the principles of *Colorado River* "in a pragmatic, flexible manner with a view to the realities of the case at hand," the district court properly decided to deny Petitioner's motion to lift the stay.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DR. WILLIAM D. ALLEN	*	CIVIL ACTION:
VERSUS	*	JURY TRIAL REQUESTED
LOUISIANA STATE BOARD OF DENTISTRY: DR. J. ROY CHUSTZ; DR. N. FRANCIS LABORDE; GUY WOOTAN; KENNETH M. BOUDREAUX, R.D.H.; DR. LIONEL L. de la HOUSSAYE; DR. RUSSELL R. DiMARCO; DR. MERRICK A. DUGAS, JR.; DR. BENNETT P. FONTENOT; DR. RALPH B. KING, JR.; DR. JOSEPH M. KOCHANSKY; DR. HERMAN O. BLACKWOOD, III; DR. DAVID E. SIMMONS; AND DR. JAMES P. TOMASZEWSKI, EACH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES	*	NUMBER 86-0623
	*	SECTION "E"
	*	MAGISTRATE 1

SECOND SUPPLEMENTAL
AND AMENDED COMPLAINT

COMPLAINT FOR DEPRIVATION
OF CONSTITUTIONAL RIGHTS

Complainant desires to amend and supplement his original complaint in its entirety to read as follows:

1.

This is an action for injunctive and declaratory relief, and for money damages, both compensatory and punitive, as authorized by 42 U.S.C. § 1983 to secure rights, privileges, and immunities established by the First, Fourth, and Fourteenth Amendments to the United States Constitution.

2.

The jurisiction [sic] of this Court is invoked under 28 U.S.C. § 1331(a), 1343(3), and (4). Plaintiff also seeks injunctive relief, and such further relief as is warranted by 28 U.S.C. § 2201-2202.

3.

Complainant, William D. Allen, a citizen of the United States, is a resident of lawful age of the Parish of East Baton Rouge, Louisiana.

4.

Defendants are as follows:

1. Mr. Guy Wootan, resident of and domiciled in New Orleans, Louisiana, individually and in his official capacity as agent of the Louisiana State Board of Dentistry;

2. Louisiana State Board of Dentistry, a Division of the Department of Health and Human Resources of the State of Louisiana, whose domicile is in the Parish of

Orleans, New Orleans, Louisiana and the members of the Board who are listed as follows:

3. Dr. J. Roy Chustz, resident of and domiciled in Baton Rouge, Louisiana, individually and in his official capacity;

4. Dr. N. Francis Laborde, resident of and domiciled in Marksville, Louisiana, individually and in his official capacity;

5. Mr. Kenneth M. Boudreaux, R.D.H., a resident of and domiciled in New Iberia, Louisiana, individually and in his official capacity;

6. Dr. Lionel L. de la Houssaye, resident of and domiciled in Lake Charles, Louisiana, individually and in his official capacity;

7. Dr. Russell R. DiMarco, resident of and domiciled in Gretna, Louisiana, individually and in his official capacity;

8. Dr. Merrick A. Dugal, Jr., a resident of and domiciled in Houma, Louisiana, individually and in his official capacity;

9. Dr. Bennett P. Fontenot, resident of and domiciled in Breaux Bridge, Louisiana, individually and in his official capacity;

10. Dr. Ralph B. King, Jr., resident of and domiciled in Monroe, Louisiana, individually and in his official capacity;

11. Dr. Joseph M. Kochansky, resident of and domiciled in Lafayette, Louisiana, individually and in his official capacity;

12. Dr. David E. Simmons, resident of and domiciled in New Orleans, Louisiana, individually and in his official capacity;

13. Dr. James P. Tomaszewski, resident of and domiciled in Slidell, Louisiana, individually and in his official capacity; and

14. Dr. Herman O. Blackwood, III, resident of and domiciled in Shreveport, Louisiana, individually and in his official capacity.

5.

The defendant Louisiana State Board of Dentistry has revoked plaintiff's license to practice dentistry in the State of Louisiana under the provisions of La. R.S. 37:751-792.

6.

The charges filed against the complainant by the Louisiana State Board of Dentistry leading to the revocation of his license were filed in bad faith in order to deter, intimidate, harrass [sic], and punish plaintiff for his commercial advertising of his dental practice, specifically his advertising of dentures, which greatly decreases the price of dentures normally charged by other dentists in the area, all in violation of plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

7.

Plaintiff wishes to advertise free initial consultations but has been prevented from doing so by the Louisiana State Board of Dentistry's enforcement against him of La. R.S. 37:775 (7). This statutory provision and the Board's enforcement thereof abridge plaintiff's first and Fourteenth Amendment right to commercial free speech and is therefore unconstitutional on its face and as applied.

8.

Plaintiff wishes to advertise dentures in the local Baton Rouge papers by the use of a pictorial representation of a bridgework or denture. Such advertising of dentures is prohibited by La. R.S. 37:775 (10) and the defendant Louisiana State Board of Dentistry has sanctioned such advertising in the past. This statutory provision and the threat of enforcement thereof abridge plaintiff's First and Fourteenth Amendment right to commercial free speech and is therefore unconstitutional on its face.

9.

The defendants' agent and attorney, Guy Wootan, suggested to Brenda Gremillion, a former employee of Dr. William D. Allen, that she remove confidential patient charts from the offices of Dr. Allen, copy these charts, and turn the copies over to him for use in prosecuting Dr. Allen. Said Guy Wootan also caused and provoked former employees of Dr. Allen, namely, Terry Marino and Brenda Gremillion, to return to the offices of Dr. William

D. Allen and obtain by means of a burglary confidential information from Dr. Allen's appointment book, to copy this information, and to turn the names of patients, dates, and procedures over to him for use in prosecuting Dr. Allen.

10.

The said Guy Wootan and Dr. J. Roy Chustz, President of the Louisiana State Board of Dentistry, in investigating and bringing charges under the hereinabove referred to statutes, have used their authority in an unfair and unconstitutional manner, specifically, but not exclusively as follows:

(a). By continually calling the office of Dr. Allen and questioning his employees in an attempt to learn whether any employee is dissatisfied and willing to give unfavorable testimony against his or her employer;

(b). By specifically excluding any favorable witnesses for Dr. Allen, but concentrating their efforts on employees who have been discharged and who are biased against Dr. Allen for personal reasons not connected with or having any relation to his professional ability;

(c). By harrassing [sic], intimidating, and invading the privacy of proposed favorable witnesses for Dr. Allen and by maligning said employees, specifically, but not exclusively, Linda Rachel Davidson, by direct contact with the employer of said employee, wherein Mr. Wootan told Rachel Davidson's employer an outrageous tale

about her and said that he was having her followed and threatened to have her cited for contempt, all of which was designed to intimidate Rachel Davidson and to frighten her as a witness for Dr. Allen; and

(d). By obtaining information on the personal life of Dr. William D. Allen and attempting to use such information in a disparaging and defamatory manner where such facts and information have no relation to complainant's practice of dentistry.

11.

Complainant has been forced to defend numerous allegations made and prepared by defendants without adequate substantiation and the defendants have refused to amend the charges to be consistent with the statements of the defendants' own witnesses; and with such broad and sweeping charges defaming complainant's character, defendants have harassed and intimidated complainant and denied him the usual and customary safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

12.

The license revocation procedures of the Louisiana State Board of Dentistry denied plaintiff due process of law for the following reasons:

(a). The charges brought against plaintiff were brought by disgruntled former employees of plaintiff who met with Mr. Guy Wootan, the Louisiana State Board

of Dentistry's attorney and investigator, informing him of various alleged infractions of the State Dental Practice Act. No Adequate effort was made by Mr. Wootan, by any member of the Board, or by any other agent of the Board, to substantiate the allegations of these former employees. No patient allegedly treated by these employees was contacted by the Board or by any of its agents, including Mr. Guy Wootan, to verify the complaints of the employees before the filing of the charges. The failure of the Board to substantiate the charges against Dr. Allen is contrary to La. R.S. 37:779 and contrary to fundamental requirements of fair play guaranteed by the Due Process Clause of the Fourteenth Amendment.

(b). The Louisiana State Board of Dentistry delegated the decision to institute license revocation proceedings against Dr. William D. Allen to its legal counsel, Mr. Guy Wootan. No adequate review of Mr. Wootan's determination to charge Dr. Allen with violations of the Louisiana Dental Practice Act was made by any State Board member or by any internal review mechanism which would prevent the bringing and filing of unsubstantiated charges against Dr. William D. Allen.

(c). The charges brought against plaintiff were prepared by Mr. Guy Wootan, the Louisiana State Board of Dentistry's legal counsel and its sole investigator at the time. The charges are grossly inflated, reciting alleged violations which Mr. Wootan knew or should have known had not occurred.

13.

Plaintiff was denied due process of law at the administrative hearing held on February 21, 1986, to February 24, 1986, for the following specific, but not exclusive, reasons:

(a). The conduct of the hearing by the Chairman, Dr. Lionel L. de la Houssaye, showed overwhelming bias in favor of the prosecution. The hearing panel's anger and antagonism toward defense counsel was inconsistent with the impartiality demanded by due process of law.

(b). The denial of Dr. Allen's request to adduce by deposition the favorable testimony of sick witnesses and the refusal of Dr. de la Houssaye to allow defense counsel to make their proffers of proof at the conclusion of the administrative hearing denied Dr. Allen a fair opportunity to put on his defense, contrary to due process of law.

(c). The refusal of the hearing panel to allow defense counsel to call Brenda Gremillion as a defense witness denied Dr. Allen an opportunity to prove that the proceeding against him was tainted by Guy Wootan's request for specific information from Terry Marino and Brenda Gremillion which incited them to commit the felony of burglary of Dr. William D. Allen's office. The sole reason for the illegal entry into Dr. Allen's office was to obtain the names of patients, dates, and procedures from Dr. Allen's appointment book in order to help Mr. Wootan prosecute Dr. Allen.

(d). The refusal of the hearing panel to allow defense counsel to file a motion to dismiss and/or to

strike the charges against Dr. Allen, urging that the prosecution of Dr. Allen was the fruit of an illegal breaking and entering of Dr. Allen's office for the sole purpose of obtaining evidence to be used by the Board's counsel, Guy Wootan, and Dr. de la Houssaye's purported striking of said motion from the record of the administrative proceeding so obstructed the assertion of Dr. Allen's Fourth and Fourteenth Amendment rights against unreasonable searches and seizures as to constitute a denial of due process of law.

(e). Each member of the hearing panel, Chairman Lionel L. de la Houssaye, and Drs. Russell R. DiMarco, Merrick A. Dugall, Jr., and N. Francis Laborde had a direct personal economic interest in the outcome of the administrative proceeding as it would affect the outcome of the federal civil rights action that had previously been filed against the Louisiana State Board of Dentistry and the members of the hearing panel. This personal interest and the appearance of impropriety required each member of the hearing panel to recuse himself from Dr. Allen's case, yet the members of the hearing panel insisted on trying Dr. Allen's case and denied his motion to recuse, all contrary to the fundamental requirements of procedural due process guaranteed to complainant, Dr. William D. Allen, by the Due Process Clause of the Fourteenth Amendment.

14.

The principal evidence relied upon by Mr. Guy Wootan, the Louisiana State Board of Dentistry's agent, attorney, and prosecutor, in framing the charges against

Dr. Allen was derived from an illegal entry by Terry Marino and Brenda Gremillion into Dr. Allen's office around 10 P.M. on Monday, August 26, 1985. The sole reason for the illegal entry into Dr. Allen's office was to obtain information on patients from Dr. Allen's appointment book to be used in prosecuting Dr. Allen because of the indicated request of Guy Wootan, who acts under color of state law and as agent of the Louisiana State Board of Dentistry.

15.

The action of the hearing panel, namely, Drs. Lionel L. de la Houssaye, N. Francis Laborde, Russell R. DiMarco, and Merrick A. Dugal, Jr., in knowingly utilizing the fruits of the illegal entry into Dr. Allen's office shows a reckless disregard for the rights of privacy of all citizens, including the complainant, Dr. William D. Allen, protected by Article I, § 5 of the Louisiana Constitution of 1974 and the Fourth Amendment to the United States Constitution made binding on the states and their subordinate agencies through the Fourteenth Amendment.

16.

The conduct of the Louisiana State Board of Dentistry's attorney-prosecutor, Mr. Guy Wootan, shows a reckless disregard for the truth by not requiring adequate substantiation of the charges against Dr. William D. Allen and shows an overzealous drive to convict Dr. Allen regardless of the true facts. Mr. Wootan knew that certain of Dr. Allen's patients, who had no bias or interest in the case, had denied the charges, yet he never informed

either the Board's President, the hearing panel, or Dr. Allen's counsel of this information. Mr. Wootan's wanton obstruction of the truth justifies imposition of punitive damages against him, individually and as agent of the Louisiana State Board of Dentistry.

17.

The lack of supervision and control on the part of Dr. J. Roy Chustz, President of the Louisiana State Board of Dentistry, and of the Board generally over its attorney-prosecutor, Guy Wootan, shows a reckless disregard of the rights of the plaintiff, Dr. William D. Allen, justifying imposition of punitive damages against the defendants, individually, and in their official capacities.

18.

The Board's lawyer and prosecutor, Mr. Guy Wootan, drafted the final decision of March 24, 1986, revoking plaintiff's license. This mixing of prosecutional and adjudicative functions denied plaintiff due process of law.

19.

The hearing panel's final decision of March 24, 1986, drafted by the Board's prosecutor, Guy Wootan, capriciously disregards the testimony of the Board's own witnesses and falsely characterizes the testimony of defense witnesses, including Rachel Davidson, Rosa Jones, and Myrtle Douglas, depriving Dr. William D. Allen of due process of law.

20.

Plaintiff was denied due process of law at the February, 1986, administrative hearing and again at the partial rehearing on June 21, 1986, held pursuant to the judgment of the Honorable Judge Steven R. Plotkin of the Civil District Court of Orleans Parish, Louisiana, dated May 2, 1986, by the refusal of Dr. Lionel L. de la Houssaye, Chariman [sic] of the hearing panel, to allow defense counsel a full opportunity to cross-examine Dr. J. Roy Chustz, President of the Louisiana State Board of Dentistry, regarding his and the Board's failure to substantiate the charges brought against Dr. William D. Allen.

21.

Pursuant to 42 U.S.C. § 1983, plaintiff is entitled to a judgment declaring the Louisiana State Board of Dentistry's license revocation procedures unconstitutional as applied to plaintiff.

22.

Pursuant to 42 U.S.C. § 1983, plaintiff is entitled to a declaratory judgment declaring La. R.S. 37:775 (7) and La. R.S. 37.775 (10) unconstitutional on their face and as applied to plaintiff.

23.

Pursuant to 42 U.S.C. § 1983, plaintiff is further entitled to a permanent injunction (i) enjoining the Louisiana State Board of Dentistry, its employees and agents, from

enforcing La. R.S. 37:775 (7) and La. R.S. 37:775 (10); (ii) enjoining the Louisiana State Board of Dentistry from enforcing the provisions of the Louisiana State Dental Practice Act against plaintiff in any manner that denies plaintiff due process of law; (iii) enjoining defendants from calling employees of plaintiff and plaintiff's former employees and from constantly harassing, threatening, and intimidating his employees and from invading complainant's privacy, and attempting to deny plaintiff the right to advertise his dental practice as guaranteed by the First Amendment to the United States Constitution; and (iv) otherwise implementing appropriately in scope and form the declaratory judgment prayed for above.

24.

Petitioner claims as special damages monies expended in defense of the proceedings entitled "Louisiana State Board of Dentistry vs. Dr. William D. Allen," which was a disciplinary proceeding brought by the Louisiana State Board of Dentistry and which special damages amount to the sum of ONE MILLION FIVE HUNDRED THOUSAND AND NO/100 DOLLARS ($1,500,000.00), which sum includes attorney fees, expenses, and loss of revenue to Dr. Allen's dental practice.

25.

The defendants are liable, in solido, for compensatory damages to the plaintiff as follows:

a.	Invasion of privacy	$3,000,000.00
b.	Denial of due process	2,000,000.00
c.	Defamation of character	3,000,000.00
d.	Denial of first amendment rights	1,000,000.00
e.	Mental pain and anguish	3,000,000.00

26.

The defendants are liable, in solido, for punitive damages to the plaintiff as follows:

a.	Invasion of privacy	$5,000,000.00
b.	Denial of due process	5,000,000.00
c.	Defamation of character	5,000,000.00
d.	Denial of first amendment rights	5,000,000.00

The plaintiff expressly reserves the right to join as parties defendant any liability insurance carriers, as yet unknown to the plaintiff, that have issued policies insuring any of the defendants, including the Louisiana State Board of Dentistry, and any malpractice carrier insuring the law practice of Mr. Guy Wootan, the Louisiana State Board of Dentistry's attorney and prosecutor.

27.

Plaintiff is entitled by reason of 42 U.S.C. § 1988 to reimbursement of the costs of this action and the reasonable attorney's fees thereof.

28.

The plaintiff requests that this action be tried before a jury of his peers.

WHEREFORE, plaintiff prays that this Court:

1. Let the original complaint be supplemented and amended as set forth herein.

2. Issue a declaratory judgment (i) declaring La. R.S. 37:775 (7) unconstitutional on its face and as applied to plaintiff; (ii) declaring La. R.S. 37:775 (10) unconstitutional on its face and as applied to plaintiff; (iii) declaring the Louisiana State Board of Dentistry's license revocation procedures unconstitutional as applied to plaintiff.

3. Issue a permanent injunction (i) enjoining the Louisiana State Board of Dentistry, its employees and agents, from enforcing La. R.S. 37:775 (7) and La. R.S. 37:775 (10); (ii) enjoining the Louisiana State Board of Dentistry from enforcing the provisions of the Louisiana State Dental Practice Act against plaintiff in any manner that denies plaintiff due process of law; (iii) enjoining defendants from calling employees of plaintiff and plaintiff's former employees and from constantly harassing, threatening, and imtimidating [sic] his employees and from invading complainant's privacy; and (iv) otherwise implementing appropriately in scope and form the declaratory judgment prayed for above.

4. After a jury trial on the merits, enter a judgment against the defendants in solido for such special, compensatory, and punitive damages as the jury determines are owing for invasion of plaintiff's rights to privacy, due process, defamation of character, mental pain and anguish, and freedom of commercial speech.

5. Grant plaintiff all costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988, and such other and further relief as may be just and equitable.

Respectfully submitted,

PARKER & PARKER

BY: /s/ J. Peyton Parker, Jr.
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CERTIFICATE

I HEREBY CERTIFY THAT A COPY
(illegible)

23rd June, 19 86

BY: /s/ J. Peyton Parker, Jr.
J. PEYTON PARKER, JR.

Petitioner's Reply Brief
to the Fifth Circuit

* * *

Fourth. Appellees ask, Brief, p. 23:

> "Exactly which defendants does Allen claim are liable for his attorney's fees at this point? He does not say, but the district court would be required to make a finding."

The obvious answer, sufficient for this appeal, is defendant Louisiana State Board of Dentistry. Whether other defendants are liable for attorney's fees, and to what extent, must await legal determinations yet to be made by the district court, subject to review here. The district court did not entertain Allen's motion for partial summary judgment on § 1985 liability. We agree with Appellees that this "is not an issue which is properly before this Court." Brief of Appellees, p. 20.

Nor are the *"Mysteries of the Eleventh Amendment," Brennan v. Stewart,* 834 F.2d 1248, 1251 (5th Cir. 1988) (per Gee, J.), yet a part of this case. So too, there are no immunity questions before your Honors at this time. Hence we do not address these issues.

* * *

Supreme Court, U.S.
FILED
APR 22 1992
OFFICE OF THE CLERK

No. 91-1455

In The

Supreme Court of the United States

October Term, 1991

WILLIAM D. ALLEN, D.D.S.,

Petitioner,

v.

LOUISIANA STATE BOARD OF DENTISTRY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Rule 24.4, petitioner Allen files this reply to respondents' brief in opposition.

Several material misstatements of law and fact taint the Respondents' Brief in Opposition, *viz.*:

FIRST. Respondents say (Brief in Opposition, pp. 2-3 n.2), apropos limiting our federal claim to fees and not damages at this stage: "By so arguing, Petitioner attempts to rewrite his pleadings to the district court." But this Court has expressly approved counsel's limiting the scope of the relief requested at the appellate stage, as we did in the Fifth Circuit below. See *Deakins v. Monagahan*, 484 U.S. 193, 199-200 (1988) (expressly noting "the effect of [counsel's] representations and our reliance thereon will have on the shape of the federal litigation.").

SECOND. Respondents repeatedly characterize Allen's success on his due process claim in the Louisiana Supreme Court as a mere technical victory amounting to nothing, *viz.* (Brief in Opposition, p. 10): "How, *at this stage*, can Petitioner's reversal be said to be anything but a 'technical victory,' which returns him to the beginning of the disciplinary proceedings, but grants him no other relief? How, exactly has the 'legal relationship' between the parties changed?" But the Board's belittling of Allen's success in the Louisiana Supreme Court on his due process claim ignores the rule of *Carey v. Piphus*, 435 U.S. 247, 266 (1978), which we recited in our certiorari petition, p. 9, and trivializes constitutional litigation contrary to Congress' and this Court's teachings:

> "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and

constitutional rights that cannot be valued solely in monetary terms. See *Carey v. Piphus*, 435 U.S. 247, 266 (1978). And, Congress has determined that 'the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. . . . ' *Hensley*, 461 U.S., at 444, n. 4 (BRENNAN, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards. . . .

> " 'The institutional behavior involved here . . . had to be stopped and . . . nothing short of having a lawsuit like this would have stopped it.' [quoting District Court]. . . .
>
> "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit ' "does so not for himself alone but also as a private attorney general," vindicating a policy that Congress considered of the highest importance." ' House Report, at 2 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). 'If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.' 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney)."

Riverside v. Rivera, 477 U.S. 561, 574-575 (1986) (Opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.).

What's more, as we informed the Fifth Circuit below (Appellant's Brief, p. 18):

> "The Louisiana State Board of Dentistry has apparently changed its procedures in direct response to the Louisiana Supreme Court's condemnation of the Board's practice of allowing its prosecutor secretly to draft decisions depriving dentists of their licenses to practice. 'The idea of the same person serving as judge and prosecutor is anathema under our notions of due process.' *Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908, 916 (La. 1989). The Board's current practice is to employ 'independent counsel' to assist the disciplinary committee as to its adjudicative functions. See Appendix A *infra*, p. A-3 [herein A-3]."

THIRD. Respondents say (Brief in Opposition, p. 8), that "Petitioner's impassioned insistence on lifting the stay is blind to the difficulties posed by his request." But the supposed difficulties detailed over the remaining ten pages of the brief in opposition are *not* the reasons given by the District Court for refusing to lift the stay. The District Court made no effort at all to apply the legal standards governing interim awards under § 1988; nor did it pass on our motion for summary judgment as to liability on the due process claim sustained by the Louisiana Supreme Court; nor did it try to answer any of the questions posed by Respondents' Brief in Opposition. The only question here, we submit, is whether the District Court was duty-bound to try: "[I]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff *has crossed the threshold to a fee award*

of some kind." Texas Teachers Assn. v. Garland School Dist., 489 U.S. 782, 791-792 (1989), quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978) (emphasis ours).

FOURTH. Respondents mischaracterize our claim in saying (Brief in Opposition, p. 7): "The cases do not stand for the proposition being urged by Petitioner that a federal court abuses its discretion *per se* by refusing to lift a stay to consider federal § 1983 claims piecemeal." Quite the contrary, what we say is that the District Court below abused its discretion in refusing access to an interim award of fees in the circumstances of this case, and not *per se*, under this Court's reading of § 1988:

> "The section states that the court 'in its discretion,' may allow a fee, but that discretion is not without limit: the prevailing party 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)."

Blanchard v. Bergeron, 489 U.S. 87, 89 n.1 (1989) (per White, J. for the Court).

FIFTH. Respondents ask (Brief in Opposition, p. 12): "Exactly which Respondents does Petitioner claim are liable for his attorney's fees at this point? He does not say, but the district court would be required to make a finding." The obvious answer, sufficient here, is those Respondents who participated in the denial of Allen's due process rights, sued in their official and individual capacities.

SIXTH. Respondents belatedly raise an Eleventh Amendment argument (Brief in Opposition, p. 12 n.6),

but this issue was not before the District Court and is not properly before this Court. And, at any rate, Congress has shut that door by coercively waiving Respondents' immunity from liability for attorney's fees under 42 U.S.C. § 1988. *Hutto v. Feeney*, 437 U.S. 678, 694 (1978); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 738 (1980); *Pulliam v. Allen*, 466 U.S. 522, 543 (1980); *Brandon v. Holt*, 469 U.S. 464, 472 (1985).

CONCLUSION

Respondents are wrong to say that Allen's aim is to create "havoc . . . in the district court" (Brief in Opposition, p. 17). What we seek is enforcement of the will of Congress as recited in 42 U.S.C. § 1988.[1] The Fifth Circuit's holding conflicts with this Court's opinions in Section 1988 fee cases. Because this is the first abstention case to reach this Court following the State Supreme Court's vindication of the federal constitutional claim involved, the procedural question presented is of vital significance to civil rights litigation under 42 U.S.C. §§ 1983 and 1988. Certiorari should be granted.

Respectfully submitted,

PAUL R. BAIER
JAMES E. BOREN

Counsel for Petitioner

22 April 1992

[1] And pursuant to this same statute, Petitioner Allen prays for reasonable attorney's fees for the prosecution of this writ.

APPENDIX A

JAMES P. TOMASZEWSKI, D.D.S.
PRESIDENT
FIRST CONGRESSIONAL DISTRICT

RUSSELL R. DiMARCO, D.D.S.
VICE PRESIDENT
AT LARGE

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IMMEDIATE PAST PRESIDENT
FOURTH CONGRESSIONAL DISTRICT

C. BARRY OGDEN, ESQ.
EXECUTIVE DIRECTOR

GUY WOOTAN, ESQ.
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LIONEL DE LA HOUSSAYE, D.D.S.
SEVENTH CONGRESSIONAL DISTRICT

FRANK J. DePAULA, D.D.S.
SIXTH CONGRESSIONAL DISTRICT

RALPH B. KING, JR., D.D.S.
FIFTH CONGRESSIONAL DISTRICT

N. FRANCIS LABORDE, D.D.S.
EIGHT CONGRESSIONAL DISTRICT

VINCENT N. LIBERTO, D.D.S., M.S.
SECOND CONGRESSIONAL DISTRICT

JAMES R. LANG, JR., D.D.S., M.S.D.
AT LARGE

CHARLEY M. LESTER, D.D.S.
AT LARGE

DONA ANDERS, R.D.H.
AT LARGE

[SEAL]

LOUISIANA STATE BOARD OF DENTISTRY
1515 POYDRAS STREET, SUITE 1850
NEW ORLEANS, LOUISIANA 70112
TELEPHONE: (504) 568-8574
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December 11, 1990

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108 Westside Boulevard
Houma, Louisiana 70364

RE: In re: William D. Allen, D.D.S.

Gentlemen:

On behalf of the Louisiana State Board of Dentistry please accept our gratitude for your agreeing to serve as members pro tem of the Louisiana State Board of Dentistry to hear the the above referenced disciplinary matter.

No action in this matter has been taken since August 25, 1990 when the Board members hearing this matter decided to recuse themselves. Hence, it is important to resume these proceedings as soon as possible.

The purpose of this letter is to attempt to coordinate logistics in this matter. I need information from each of your apprising me of all days in the next six months which are impossible for you to conduct the hearings pertinent to this proceeding.

All hearings shall be conducted in New Orleans. You shall be given ample notice and instructions prior to each hearing or meeting. The Louisiana State Board of Dentistry will reimburse all of your expenses as provided by

law under the state regulations, and you will be compensated at the per diem rate of $50.00 per day. I shall instruct you on how to prepare the documentation for reimbursement and per diem.

A self addressed, pre-stamped envelope is enclosed for your convenience. I look forward to meeting and working with you in this matter. If I can be of any assistance, or if you have any questions, please feel free to contact me. However, please be advised that under no circumstances can you discuss the merits of this case with myself or anyone else for that matter.

Retired Judge John C. Boutall presently serves as your independent counsel in this matter. His telephone number is (504) 834-8410. His address is 1013 Causeway Boulevard, Metairie, Louisiana 70001. You should direct any questions or concerns you have relative to the case to Judge Boutall. Direct all questions relative to travel arrangements, reimbursements, logistics, etc., to me.

Again, let me thank you for serving the public with us in this matter. Wishing you and yours a happy holiday, I remain,

Yours very truly,

/s/ C. Barry Ogden
C. Barry Ogden
Executive Director

CBO:drb

cc: James P. Tomaszewski
Guy Wootan, Esq.
Judge John C. Boutall
Paul Baier, Esq.
Wade Shows, Esq.